United States Court of Appeals for the Second Circuit

APPENDIX

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76-5004

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United States Court of Appeals
FOR THE SECOND CIRCUIT

P/S

ALAN B. MILLER, as Trustee in Bankruptcy of
AMERICAN IBC CORP., Bankrupt,

Plaintiff-Appellee,

against

WELLS FARGO BANK INTERNATIONAL CORP.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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7/9/75	Filed Post-trial Memorandum of law of Trustee-plaintiff
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2/5/76	Filed Defendant's Notice of Appeal from Final Judgment of 1/8/76

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------X

ALAN B. MILLER, as Trustee in :
Bankruptcy of AMERICAN IBC CORP., 74 Civ.
Bankrupt, :

Plaintiff, :

-against- : COMPLAINT

WELLS FARGO BANK INTERNATIONAL CORP., :

Defendant. :

---------------------------------------X

Plaintiff, Alan B. Miller, as Trustee in Bankruptcy of American IBC Corp., Bankrupt, by his attorneys, Weil, Gotshal & Manges, for his complaint respectfully alleges:

JURISDICTION AND VENUE

1. Jurisdiction of the Court is based upon 28 U.S.C. §1331 as both claims for relief arise under the Bankruptcy Act and are in excess of $10,000.

2. Venue is laid in this Court pursuant to 28 U.S.C. §1391(c).

THE PARTIES

3. American IBC Corp. ("American IBC") was incorporated under the laws of Delaware and maintained its principal place of business within the Southern District of New York.

4. On January 29, 1974, an involuntary petition in bankruptcy was filed against American IBC with the

United States Distrct Court for the Southern District of New York ("Bankruptcy Court").

5. On February 14, 1974, American IBC was adjudged bankrupt by the Bankruptcy Court, and on April 2, 1974, Alan B. Miller ("Trustee") was designated trustee of the bankrupt's estate, has since qualified and is presently acting in that capacity.

6. On information and belief, defendant Wells Fargo Bank International Corp. ("Wells Fargo") is incorporated under the laws of New York, maintains its principal place of business within the Southern District of New York, and is a wholly-owned subsidiary of Wells Fargo Bank, N.A.

FOR A FIRST CAUSE OF ACTION

7. On or about May 2, 1973, American IBC entered into a transaction with Wells Fargo pursuant to which American IBC borrowed $1,000,000.

8. On or about November 2, 1973, and within four months of the filing of the aforesaid petition in bankruptcy, American IBC transferred $1,042,814.37 to Wells Fargo on account of its antecedent debt to Wells Fargo.

9. As a result of such transfer on November 2, 1973, Wells Fargo obtained a greater percentage of its debt than some other creditor of the same class.

10. At the time of the November 2, 1973 transfer, American IBC was insolvent.

11. On information and belief, at the time of the November 2, 1973 transfer, Wells Fargo had reasonable cause to believe that American IBC was insolvent.

12. The November 2, 1973 transfer from American IBC to Wells Fargo constitutes a preference as defined by §60a of the Bankruptcy Act, 11 U.S.C. §96(a), and is voidable by the Trustee under §60b of the Bankruptcy Act, 11 U.S.C. §96(b).

AS AND FOR A SECOND CAUSE OF ACTION

13. On or about May 17, 1973 American IBC entered into a transaction with Wells Fargo pursuant to which American IBC borrowed $1,000,000.

14. On or about November 19, 1973 and within four months of the filing of the aforesaid petition in bankruptcy, American IBC transferred $1,046,894.05 to Wells Fargo on account of its antecedent debt to Wells Fargo.

15. As a result of such transfer on November 19, 1973 transfer, Wells Fargo obtained a greater percentage of its debt than some other creditor of the same class.

16. At the time of the November 19, 1973 transfer, American IBC was insolvent.

17. On information and belief, at the time of the November 19, 1973 transfer, Wells Fargo had reasonable cause to believe that American IBC was insolvent.

8. The November 19, 1973 transfer from American IBC to Wells Fargo constitutes a preference as defined by §60a of the Bankruptcy Act, 11 U.S.C. §96(a), and is voidable by the Trustee under §60b of the Bankruptcy Act, 11 U.S.C. §96(b).

WHEREFORE, plaintiff Alan B. Miller, as Trustee for American IBC Corp., Bankrupt, (1) seeks an order setting aside the November 2, 1973 and November 19, 1973 transfers from American IBC to Wells Fargo and (2) demands judgment against defendant Wells Fargo Bank International Corp. in the sum of $2,089,708.42 at the legal rate of interest from the dates of the transfers, plus the costs and disbursements of this action and such other relief as this Court deems just and proper.

Dated: New York, New York
August 26, 1974

WEIL, GOTSHAL & MANGES

By: ______________________
(A Member of the Firm)
Attorneys for Trustee
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-- X

ALAN B. MILLER, as Trustee in Bankruptcy of AMERICAN IBC CORP., Bankrupt, :
Plaintiff, :
-against- :
WELLS FARGO BANK INTERNATIONAL CORP., :
Defendant. :

-- X

74 Civ. 3714

ANSWER

(M.P.)

Defendant, Wells Fargo Bank International Corporation, ("Wells Fargo") by its attorneys, Dunnington, Bartholow & Miller for its Answer to the Complaint herein states as follows:

1. Denies each and every allegation of Paragraph 1.

2. Denies each and every allegation of Paragraph 2.

3. Admits, on information and belief, the allegations of Paragraph 3.

4. Admits the allegations of Paragraph 4.

5. Admits the allegations of Paragraph 5.

6. Admits the allegations of Paragraph 6.

7. Denies each and every allegation of Paragraph 7 except admits that on or about May 2, 1973, American IBC Corp. entered into a transaction with Wells Fargo pursuant to which American IBC Corp. borrowed $1,000,000.00 as is more fully set forth in defendant's Fourth Affirmative Defense.

8. Denies each and every allegation of Paragraph 8, except admits that $1,042,814.37 was paid to Wells Fargo on or about November 2, 1973 as is more fully set forth in defendant's Fourth Affirmative Defense.

9. Denies each and every allegation of Paragraph 9.

10. Denies, upon information and belief, each and every allegation of Paragraph 10.

11. Denies each and every allegation of Paragraph 11.

12. Denies each and every allegation of Paragraph 12.

13. Denies each and every allegation of Paragraph 13 except admits that on or about May 17, 1973 American IBC Corp. entered into a transaction with Wells Fargo pursuant to which American IBC Corp. borrowed $1,000,000.00 as is more fully set forth in defendant's Fifth Affirmative Defense.

14. Denies each and every allegation of Paragraph 14 except admits that on November 17, 1973 $1,046,894.05 was paid to Wells Fargo as is more fully set forth in defendant's Fifth Affirmative Defense.

15. Denies each and every allegation of Paragraph 15.

16. Denies, upon information and belief, each and every allegation of Paragraph 16.

17. Denies each and every allegation of Paragraph 17.

18. Denies each and every allegation of Paragraph 18.

FIRST AFFIRMATIVE DEFENSE

19. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

20. This court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

21. The Complaint and each cause of action set forth therein is barred by the Statute of Limitations.

FOURTH AFFIRMATIVE DEFENSE

22. On or about January 29, 1970 American IBC Corp. executed a continuing General Pledge Agreement on the standard form of Wells Fargo which General Pledge Agreement was in full force and effect at all times hereinafter mentioned. The General Pledge Agreement is a two-page document and reference is made to the document itself for the terms and conditions therein contained. American IBC Corp. pledged as collateral to Wells Fargo in the General Pledge Agreement, "all money and property heretofore delivered or which shall hereafter be delivered to or come into the possession, custody or control of Bank".

Because the net worth of American IBC Corp. was never substantial, Wells Fargo dealt with American IBC Corp. only on a secured basis. In May of 1973, Wells Fargo entered into two transactions with American IBC Corp., each involving a loan by Wells Fargo to American IBC Corp. of $1,000,000.00. Both transactions were essentially arbitrage transactions in which American IBC Corp. availed itself of the differential between spot rates of exchange and forward rates of exchange between the United States dollar and the Swiss Franc. When the exchange rate differential was sufficiently large to cover the net interest on American IBC Corp's borrowings and make a profit for American IBC Corp., it could borrow the funds, make a profit and the loan would be self-liquidating.

23. On or about May 2, 1973, Wells Fargo agreed to lend to American IBC Corp. and American IBC Corp. agreed to borrow $1,000,000.00 at 8% on a 360 day basis. Reference is hereby made

to the documents for the terms and conditions of this agreement. The borrowing was for 182 days and the maturity date of the loan was November 2, 1973 pursuant to this agreement. The proceeds of this advance were transferred to the Chase Manhattan Bank for credit to the account of Swiss Credit Bank Zurich, reference American IBC Corp. Swiss Credit Bank Zurich delivered for value May 3, 1973 the sum of 3,240,000 Swiss Francs to Swiss Credit Corporation Zurich in favor of Wells Fargo Luxembourg, reference American IBC Corp. These 3,240,000 Swiss Francs were placed in a time deposit value May 3, 1973 until November 2, 1973 at an interest rate of 4.25% per annum. The Swiss Franc Time Deposit was lodged with Wells Fargo Luxembourg as collateral for the loan and was subordinated to such loan.

24. On or about April 30, 1973 American IBC Corp. sold to Swiss Credit Bank Zurich 3,308,850 Swiss Francs value November 2, 1973 for $1,042,814.37 United States funds. These 3,308,850 Swiss Francs were equal to the Swiss Franc Time Deposit with Wells Fargo Luxembourg of 3,240,000 with the interest earned thereon for the 182 day period ending November 2, 1973 and in addition, gave American IBC Corp. a profit of $2,369.93 on the transaction.

25. Pursuant to that same Agreement, Wells Fargo instructed Wells Fargo Luxembourg to deliver on November 2, 1973 the Swiss Franc Time Deposit held by it through Swiss Bank Corporation Zurich to Swiss Credit Bank Zurich in favor of American IBC Corp., attention Mr. Ribi. American IBC Corp. in turn instructed Swiss Credit Bank to deliver to Wells Fargo the

sum of $1,042,814.37 on November 2, 1973

26. Pursuant to the Agreement between Wells Fargo and American IBC Corp. on November 2, 1973, Wells Fargo reimbursed itself $1,000,000.00 United States principal amount together with $40,444.44 for the 182 days interest. In addition, it credited to the account of American IBC Corp. the difference of $2,369.93 in United States funds.

27. The application of funds on November 2, 1973 in payment of American IBC Corp's debt was made pursuant to agreement with American IBC Corp. and was made in the ordinary course of business. As such it was a proper and valid set-off by Wells Fargo under §68 of the Bankruptcy Act, 11 U.S.C. §108 and as such is not voidable as a preference by the plaintiff under §60 of the Bankruptcy Act 11 U.S.C. §96.

FIFTH AFFIRMATIVE DEFENSE

28. Defendant repeats and realleges each and every allegation of Paragraph 22 of the Answer.

29. On May 15, 1973 American IBC Corp. and Wells Fargo entered into an Agreement whereby Wells Fargo loaned American IBC Corp. $1,000,000.00 United States funds value May 17, 1973, maturing November 19, 1973 at an interest rate of 8.5% per 360 days. Reference is hereby made to the document for the terms and conditions of that Agreement. The Agreement provided that Wells Fargo was to deliver this $1,000,000.00 United States Funds to Chase Manhattan Bank, New York in favor of Swiss Credit Bank Zurich reference American IBC Corp. value May 17, 1973. American IBC Corp. instructed Swiss Credit Bank Zurich to repay Wells Fargo

the sum of $1,046,894.03 on November 19, 1973 and gave a copy of these instructions to Wells Fargo.

30. American IBC Corp. in turn purchased 3,130,000 Swiss Francs value May 17, 1973 from Swiss Credit Bank and instructed Swiss Credit Bank to deliver the Swiss Francs so purchased to the account of United California Bank in London in a time deposit maturing on November 19, 1973 which bore interest at the rate of 3.25% per 360 days. American IBC Corp. also instructed United California Bank London to pay the sum of 3,182,557.92 Swiss Francs, (the principal amount of the Swiss Francs Time Deposit 3,130,000 together with interest of 52,557.92 Swiss Francs on November 19, 1973) to Swiss Credit Bank Zurich attention Mr. Ribi in favor of American IBC Corp.

31. On May 15, 1973 American IBC Corp. had purchased $1,046,894.05 United States funds for delivery November 19, 1973 for 3,182,557.92 Swiss Francs from Swiss Credit Bank. American IBC Corp. instructed Swiss Credit Bank to deliver the $1,046,894.05 to Wells Fargo on November 19, 1973.

32. Copies of all instructions were delivered to Wells Fargo together with the other documents evidencing the transactions and these were pledged to Wells Fargo as security for its loan. Pursuant to the Agreement on November 19, 1973 Swiss Credit Bank followed instructions and paid $1,046,894.05 United States funds to Wells Fargo. Wells Fargo repaid the $1,000,000.00 face amount of its loan to itself together with interest in the sum of $43,916.67. It credited the balance of $2,977.38 to the account of American IBC Corp. at Wells Fargo.

33. The application of funds on November 19, 1973 in payment of American IBC Corp's debt was made pursuant to Agreement with American IBC Corp. and was made in the ordinary course of business. As such it was a proper and valid set-off by Wells Fargo under §68 of the Bankruptcy Act, 11 U.S.C. §108 and as such is not voidable as a preference by the plaintiff under §60 of the Bankruptcy Act, 11 U.S.C. §96.

WHEREFORE, defendant Wells Fargo Bank International Corporation, demands judgment dismissing the complaint in its entirety, awarding defendant its costs and disbursements in this action, including counsel fees and disbursements of defendant's attorneys, together with such other, further and different relief as the Court may deem just and proper.

Dated: New York, New York
September 17, 1974

DUNNINGTON, BARTHOLOW & MILLER

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JOINT FINDINGS OF FACT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------------x

ALAN B. MILLER, as Trustee in Bankruptcy of AMERICAN IBC CORP., Bankrupt, : 74 Civ. 3714 (M.P.)

Plaintiff, :

-against- :

WELLS FARGO BANK INTERNATIONAL CORP., :

Defendant. :
------------------------------------x

JOINT FINDINGS OF FACT

Plaintiff Alan B. Miller, as Trustee in Bankruptcy of American IBC Corp., Bankrupt and defendant Wells Fargo Bank International Corp., submit the following joint findings of fact.

FINDINGS OF FACT

I. The Parties and Their Relationship

1. American IBC Corp. ("American IBC") is a corporation organized on or about May 19, 1969 under the laws of Delaware and was engaged in international currency transactions, letter of credit transactions, "barter" and "switch" transactions and clearing currency transactions.

2. Sheldon Silverston ("Silverston") was at all times hereinafter mentioned President and Chief Executive Officer of American IBC.

3. Defendant Wells Fargo Bank International Corp.

("the Bank"), with main offices at 40 Wall Street, New York City, a wholly owned subsidiary of Wells Fargo Bank, N.A. (a national bank based in San Francisco, California) conducts its business independently as an international bank created under the Edge Act and is subject to the Regulations of the Federal Reserve Board.

4. In or about December, 1969, Victor Romano ("Romano"), a consultant to American IBC and later Executive Vice President of American IBC, introduced Donald Jardine ("Jardine"), Vice President of Wells Fargo Bank, N.A. to Silverston.

5. Subsequently, Jardine introduced Silverston and Romano to Charles Lilien ("Lilien"), the Bank's Executive Vice President, and Peter Fowler ("Fowler"), a Bank loan officer. Shortly thereafter, American IBC began doing business with the Bank.

6. American IBC did business with several loan officers of the Bank. Whichever loan officer handled the matter was responsible for approving the particular financial transaction. Transactions were reviewed by a second officer, usually William Boland ("Boland"), the Bank's officer in charge of the credit department, or Lilien.

7. Between January, 1970 and May, 1973, American IBC and the Bank entered into numerous transactions.

BEST COPY AVAILABLE

8. Silverston, at various times, advised Boland, Nikita Lobanov ("Lobanov"), another Bank loan officer, and other officers of the Bank of some of American IBC's activities. Silverston submitted proposed financial transactions to Boland or to other officers of the Bank to whom he was referred by Boland. Some of these transactions were approved and entered into.

9. American IBC forwarded annual financial statements to the Bank. Its financial statement for its fiscal year ending March 31, 1970 was sent to the Bank on or about July 28, 1970. The statement for the fiscal year ending May 31, 1971 was sent to the Bank approximately September 22, 1971. The statement for the fiscal year ending May 31, 1972 was prepared on or about September 25, 1972 and subsequently sent to the Bank.

II. The First Loan Transaction

10. In or about April, 1973, Romano telephoned Boland to inquire about rates for a loan to be used by American IBC in connection with a proposed arbitrage transaction.

11. At the time American IBC first made inquiry to Boland about the proposed arbitrage transaction, Silverston informed him that American IBC was looking to invest

the Swiss Francs at an acceptable interest rate.

12. Boland suggested that American IBC place the Swiss Francs in a time account in favor of Wells Fargo Luxembourg (a branch bank of Wells Fargo Bank, N.A.) which transacts business independently of the Bank. Wells Fargo Luxembourg offered to pay American IBC an acceptable rate of interest for the use of the Swiss Francs.

13. The Bank agreed to lend American IBC $1,000,000 in connection with the proposed arbitrage transaction. American IBC and the Bank entered into a letter agreement dated May 2, 1973, containing the terms and conditions for the loan.

September 22. 1971. The statement for the fiscal year ending

14. Up until this time, the Bank had never participated in any type of arbitrage transaction.

15. At the same time, American IBC entered into a foreign exchange contract with Swiss Credit Bank to buy Swiss Francs in the "spot" market and to buy U.S. Dollars against the delivery of Swiss Francs six months thence.

16. Pursuant to the May 2, 1973 letter agreement, American IBC borrowed $1,000,000 from the Bank on May 3, 1973 at an interest rate of 8% per annum (calculated on a 360-day basis) for a period of 182 days, the loan becoming due on November 2, 1973.

17. Pursuant to American IBC's foreign exchange contract with Swiss Credit Bank, American IBC used the $1,000,000 to purchase 3,240,000 Swiss Francs (at an exchange rate of 3.240 Swiss Francs per U.S. Dollar) from Swiss Credit Bank on May 3, 1973.

18. On May 2, 1973, American IBC also contracted with Swiss Credit Bank to sell to Swiss Credit Bank 3,308,850 Swiss Francs for delivery on November 2, 1973 for $1,042,814.37 (at an exchange rate of 3.173 Swiss Francs per U.S. Dollar). The risk of fluctuating exchange rates between May and November was entirely upon Swiss Credit Bank; American IBC was thus assured of a dollar profit on November 2, 1973, greater than the payment due the Bank on the $1,000,000 loan.

19. American IBC ordered Swiss Credit Bank to deliver the Swiss Francs into a time deposit in favor of Wells Fargo Luxembourg at Swiss Bank Corp.

20. By telex dated May 1, 1973, confirming an April 30, 1973 telephone conversation, the Bank, on behalf of American IBC, instructed Wells Fargo Luxembourg to deliver the funds in the time deposit upon its maturity (November 2, 1973) to Swiss Credit Bank for the account of American IBC.

21. On November 2, 1973, the proceeds of the time

deposit were 3,309,997.50 Swiss Francs, slightly greater than originally anticipated.

22. On November 2, 1973, Swiss Bank Corp., on behalf of Wells Fargo Luxembourg, forwarded the Swiss Francs to Swiss Credit Bank for the account of American IBC with the following instructions:

> "Remit dollar equivalent
> to Wells Fargo Bank International
> Corp."

23. On November 2, 1973, pursuant to its foreign exchange contract with American IBC, Swiss Credit Bank exchanged 3,308,850 Swiss Francs for $1,042,814.37. The remaining 1,147.50 Swiss Francs remained in American IBC's account at Swiss Credit Bank.

24. Pursuant to the May 2, 1973 letter agreement, American IBC directed Swiss Credit Bank to forward to its account at the Bank $1,042,814.37 and Swiss Credit Bank so acted.

25. Pursuant to the May 2, 1973 letter agreement, the Bank, upon receipt of the funds on November 2, 1973, credited American IBC's account with $1,042,814.37. Against this credit, the Bank debited American IBC's account in the amount of $1,000,000 (the principal due), plus $40,666.67 (the interest due).

26. The transfer of funds to American IBC's account at the Bank on November 2, 1973 and the Bank's

subsequent debiting of that account was repayment of the outstanding debt of American IBC to the Bank.

27. American IBC realized a profit of $2,147.70. In addition, American IBC retained 1,147.50 Swiss Francs in its account at Swiss Credit Bank.

III. The Second Loan Transaction

28. Shortly after the May 2, 1973 letter agreement was entered into, Silverston telephoned Boland to inquire about rates for a second $1,000,000 loan for a second arbitrage transaction.

remaining 29. United California Bank offered an acceptable rate of interest and Silverston, using the services of Meridian Deposit Brokers, Ltd., contracted with United California Bank on or about May 15, 1973 for the deposit of the Swiss Francs in a time deposit in United California Bank, London for the account of American IBC.

30. The Bank agreed to lend American IBC $1,000,000 to be used in connection with the proposed arbitrage transaction.

31. At the same time, American IBC entered into a foreign exchange contract with Swiss Credit Bank to buy Swiss Francs in the "spot" market and to buy U.S. Dollars against the delivery of Swiss Francs six months thence.

32. On May 17, 1973, American IBC borrowed $1,000,000 from the Bank at an interest rate of 8.5% per annum (calculated on a 360-day basis) for a period of 186 days, the loan becoming due on November 19, 1973.

33. Wells Fargo Bank, N.A. (San Francisco) had a $200,000 participation in this loan.

34. Pursuant to American IBC's foreign exchange contract with Swiss Credit Bank, American IBC used the $1,000,000 to purchase 3,130,000 Swiss Francs (at an exchange rate of 3.130 Swiss Francs per U.S. Dollar) from Swiss Credit Bank on May 17, 1973.

35. Also on May 17, 1973, American IBC contracted to sell to Swiss Credit Bank 3,182,557.83 Swiss Francs, for delivery on November 19, 1973, for $1,046,894.05 (at an exchange rate of 3.040 Swiss Francs per U.S. Dollar), and Swiss Credit Bank was instructed to forward this amount to the Bank upon completion of the sale on November 19, 1973. The 3,182,557.83 Swiss Francs represented the funds in the time deposit at United California Bank, London, at maturity. The risk of fluctuating exchange rates between May and November was entirely upon Swiss Credit Bank; American IBC was thus assured of a dollar profit on November 19, 1973, greater than the payment due the Bank on the $1,000,000.00 loan.

36. American IBC ordered Swiss Credit Bank to

deliver the Swiss Francs to United California Bank, London pursuant to the contract between American IBC and United California Bank.

37. The Swiss Francs were placed in a 3.25% time deposit maturing November 19, 1973 for the account of American IBC.

38. When the loan was made on May 17, 1973, Silverston, on behalf of American IBC, advised the Bank that the funds in the United California Bank time deposit would be used to repay the Bank's second loan. With his confirming letter of May 15, 1973, Silverston enclosed copies of American IBC's instructions to United California Bank and a copy of the instructions to Swiss Credit Bank.

39. The May 15, 1973 letter stated that American IBC had given "instructions to Swiss Credit Bank to deliver the Swiss Francs to the account of United California Bank for Time Deposit."

40. The May 15, 1973 letter also stated that American IBC had given "instructions" to United California Bank London to pay the Swiss Francs principal and interest to Swiss Credit Bank, Zurich value November 19.

41. The May 15, 1973 letter further stated that American IBC had "instructed Swiss Credit Bank, Zurich to pay Wells Fargo Bank International Corp., New York, the sum of $1,046,894.05 value November 19, 1973."

42. On June 19, 1973, United California Bank confirmed by letter to Swiss Credit Bank that it had been instructed by American IBC to repay the 3,130,000 Swiss Francs to Swiss Credit Bank in favor of American IBC.

43. On June 25, 1973, Swiss Credit Bank acknowledged receipt of the confirmation from United California Bank dated June 19, 1973.

44. Swiss Credit Bank telexed United California Bank on July 16, 1973, requesting confirmation that United California Bank would "irrevocably" deliver the Swiss Francs to Swiss Credit Bank for the account of American IBC.

45. On July 16, 1973, United California Bank telexed American IBC stating:

> "Re your deposit for Swiss Francs maturing 19th November. As a result of your letter dated 15th June we confirmed to Credit Suisse on the 19th June that we have your instructions to pay them the above sum plus interest at maturity stop We did not include the word 'irrevocable' because although your letter asked us to confirm that we have your irrevocable instructions, you have not specifically given us such an instruction stop Our original confirmation to Credit Suisse was acknowledged by them on 25th June but we have again been asked by them to confirm that we have your irrevocable instructions, leading us to believe that the emphasis is on the word 'irrevocable' stop.
>
> "Please therefore send us an irrevocable instruction to pay the above-mentioned funds plus interest at maturity to Credit Suisse, Zurich stop In the meantime we would appreciate it if you would explain the situation to Credit Suisse, Zurich who are awaiting an urgent reply."

[the [illegible] irrevocable Bank]

46. On July 16, 1973, American IBC by its general counsel wrote to United California Bank:

> "With reference to our exchange of telex messages today, please consider this letter your irrevocable instructions to pay both principal and interest on our Swiss Franc Time Deposit maturing with you on 19 November, 1973 to Swiss Credit Bank Zurich."

47. On July 19, 1973, United California Bank advised Swiss Credit Bank by telex that the instructions from American IBC were "irrevocable".

48. Pursuant to its contract with American IBC, United California Bank, London on November 19, 1973 forwarded the funds in the time deposit, 3,183,557.83 Swiss Francs, to Swiss Credit Bank for the account of American IBC.

49. Pursuant to its foreign exchange contract with Swiss Credit Bank, American IBC sold 3,183,577.83 Swiss Francs to Swiss Credit Bank for $1,046,894.05.

50. On November 19, 1973, Swiss Credit Bank forwarded $1,046,894.05 to the Bank for the account of American IBC by instructing its New York correspondent, The Chase Manhattan Bank, N.A., to deliver the aforesaid sum of money to the Bank on November 19, 1973.

51. At 11:22:07 A.M. on November 19, 1973, The Chase Manhattan Bank, N.A., acted on its instructions from Swiss Credit Bank and released the funds to the Bank at the New York Clearing House. At 11:22:15 A.M., the Clearing House confirmed the release of the funds, credited the account of the Bank, and debited the account of The Chase Manhattan Bank, N.A.

52. At or about 2:15 P.M. on November 19, 1973 a messenger from the Bank picked up the payment slip at the New York Clearing House showing the payment on that day of $1,046,894.05 by Swiss Credit Bank, through The Chase Manhattan Bank, N.A., to the Bank for deposit in the account of American IBC.

53. Thereafter, that same afternoon, the Bank credited $1,046,894.05 to the account of American IBC and debited American IBC's account $1,043,916.67 in repayment of the principal and interest due on the Bank's loan to American IBC. In addition, the Bank transferred $200,000 to Wells Fargo Bank, N.A., as repayment of that bank's participating interest in this loan transaction.

54. The transfer of funds to American IBC's account at the Bank on November 19, 1973 and the Bank's subsequent debiting of that account was repayment of the outstanding debt of American IBC to the Bank.

55. American IBC realized a profit on the transaction of $2,977.38.

IV. Facts Relating To the Preference Issues

56. As of August 27, 1973, American IBC was indebted to Swiss Credit Bank in the sum of $940,603.23.

57. On August 29, 1973, Silverston telexed Swiss Credit Bank, instructing Swiss Credit Bank to debit American IBC's account an additional $75,000 and to apply the proceeds of the United California Bank time deposit ($1,046,894.05), when received (November 19, 1973), as repayment of all dollar advances theretofore made by Swiss Credit Bank to American IBC.

58. The Bank was not aware as of August 27, 1973 that American IBC was indebted to Swiss Credit Bank. The Bank did not know as of August 29, 1973, that Silverston telexed Swiss Credit Bank to apply the funds in the United California Bank time deposit to repay loans made by Swiss Credit Bank to American IBC.

59. Notwithstanding American IBC's instructions and unbeknownst to Silverston, Swiss Credit Bank on November 19, 1973 followed American IBC's original instructions and forwarded $1,046,894.05 to American IBC's account at the Bank. On November 19, 1973, Silverston met with Boland. On November 20, 1973, Silverston met with Robert Van Veersen, the Bank's loan officer in charge of Latin American transactions, to discuss a business proposal. Silverston was told

several days later that the Bank was not interested in the proposal.

60. In late October, 1973, Lobanov recommended Silverston to Dr. Stanley J. Foster, a client of the Bank, for the purpose of having American IBC enter into "switch" transactions on behalf of Sunkist Growers, Inc.

61. Silverston met Lobanov at the Bank on November 20, 1973. On November 21, 1973, Lobanov wrote a letter to Sunkist Growers, Inc., which stated that "American IBC, New York, is currently in financial difficulty" and recommended two other companies to act for Sunkist in connection with the "switch" transactions Pursuant to Bank routine, a green tissue copy of Lobanov's letter was circulated to the officers of the Bank.

62. Silverston informed Boland and Lobanov during the year 1972 about American IBC's acquisition of the stock of Banco Nacional, the purchase of land at Inca Inca Bay, Colombia, and the construction of homes in Santa Marta, Colombia. The acquisition of the assets in Colombia were reflected in the financial reports of American IBC which were sent to the Bank.

63. In or about March, 1973, Gustavo Arango ("Arango"), the Bank's representative in Colombia, called Silverston and informed him that Luis Lara ("Lara") and Gonzalo Ospina ("Ospina"), Vice Presidents of American IBC,

were claiming that they, individually, owned these assets. In October, 1972, Silverston had been warned that there were rumors to the effect that Ospina was claiming ownership of the stock of Banco Nacional. Silverston disregarded these rumors at that time in October, 1972.

64. In April, 1973, Silverston had a conversation with Boland about "problems" American IBC was having in Colombia.

65. On May 1, 1973, Silverston sent two letters to Boland, one of which contained a reference to a proposed settlement agreement with Lara and Ospina and giving the Bank instructions to serve as an escrow agent. The settlement agreement was never entered into and Lara and Ospina alleged misappropriated the Colombian assets for their own use.

66. The transactions referred to in Silverston's letters dated May 1, 1973 to the Bank did not involve the Bank, other than as an escrow agent. Boland was aware that the settlement was never consummated through the Bank.

67. The May 31, 1972 and May 31, 1971 financial statements of American IBC which were sent to the Bank showed that assets valued at approximately $3,000,000 had been invested in Colombian enterprises.

68. Banco de la Republica is, and was in 1973, the Bank's correspondent bank in Colombia.

69. In March of 1973, Banco de la Republica alleged that American IBC had breached a contract with it and consequently owed it approximately $600,000.

70. On June 20, 1973, American IBC entered into a settlement agreement with Banco de la Republica pursuant to which American IBC paid Banco de la Republica $300,000 and executed a promissory note in the amount of $297,415 with interest at 10% to be paid on December 31, 1973.

71. In July, 1973 Arango, the Bank's representative in Colombia, told Lilien that there had been a problem among American IBC, Banco de la Republica, Bulgarian Foreign Trade Bank, and Swiss Credit Bank as a result of a "currency swap" transaction in which the Bulgarian Bank failed to make a required certification, which caused Banco de la Republica to incur a loss on a letter of credit. According to Lilien, Arango said Banco de la Republica blamed American IBC for not informing it of the Bulgarian failure and had asked American IBC to reimburse it for its loss.

72. Thereupon Lilien wrote a memorandum containing a summary of the report from Arango, his instructions to Arango to consult with Banco de la Republica and to report back to him; and his instructions to Boland to fully investigate American IBC's version of the incident. The memorandum also stated that "until this is clarified, we should avoid

handling any new transactions with American IBC."

73. In September, 1973, Arango wrote Lilien and stated that the Banco de la Republica matter was settled. In addition, Silverston wrote Boland informing him that the matter had been settled and enclosed a letter from the Bulgarian Bank and a letter from National Bank of North America, both of which quoted a telex sent by Banco de la Republica to the Bulgarian Bank stating that "they withdraw entirely all claims which may have been made against [Bulgarian Bank] or American IBC arising out of this transaction." No further investigation was made by anyone at the Bank to ascertain any terms of the settlement agreement, American IBC's financial condition, or American IBC's ability to make payment of $297,415 with interest at 10% on December 31, 1973.

74. The Bank was aware that American IBC did business with United Brands.

75. On or about June 15, 1973, United Brands commenced a lawsuit against American IBC and its affiliate for approximately $3,500,000. At the same time, an order of attachment against the property of American IBC was issued and served upon Chemical Bank, Manufacturers Hanover Trust Company, Republic National Bank, First National City Bank, The Chase Manhattan Bank, N.A., Swiss Bank Corp., Barclays Bank International and National Bank of North America.

76. On September 10, 1973, the New York Law

Journal reported the signing of an order extending United Brands' time to commence turnover proceedings in its lawsuit against American IBC.

77. On October 30, 1973, the New York Law Journal reported two decisions by Judge Gellinoff in the lawsuit between United Brands and American IBC.

78. On October 19, 1973 the Bank ordered a credit report on American IBC. The Bank denominates this type of report as a "CR 39" report.

79. Beginning October 31, 1973, the Bank compiled the "CR 39" credit report on American IBC. At the time the credit report was compiled the Bank had in its files several Dun & Bradstreet reports. Pursuant to the compilation of this credit report on or about November 2, 1973, the Bank made routine inquiries of four of the banks which did business with American IBC, three of which had been served with orders of attachment in the United Brands case.

80. American IBC's account at Chemical Bank was closed by Chemical Bank during the summer of 1973 as a result of the attachment of the account by United Brands.

81. In connection with the Bank's credit report, Chemical Bank responded on or about November 12, 1973 to the Bank's prior request for credit information about American IBC:

> We closed the account of American IBC in August 1973. In the past, we approved lines on an offering basis.

82. No one at the Bank was ever informed of, nor did the Bank ever inquire about, the reasons behind Chemical Bank's closing of American IBC's account.

83. In August of 1973, American IBC breached four foreign exchange contracts with National Bank of North America and that bank commenced an action against American IBC on August 13, 1973, demanding damages in excess of $1,000,000. On August 30, 1973, American IBC entered into a settlement agreement with National Bank of North America pursuant to which American IBC agreed to [illegible] fully perform its obligations under the contracts and pay that bank $5,586,400.

84. In connection with the Bank's credit report, National Bank of North America responded on or about November 9, 1973 to the Bank's prior request for credit information about American IBC. The Bank's clerk wrote the following notation;

> We do not have a facility at the moment for the subject. In the past we have extended facilities on a secured basis. We cannot make any comment about our experience with the subject.

85. No one at the Bank made any investigation or further inquiry to determine why National Bank of North America refused to comment on American IBC.

86. The credit report, when completed, was sent to Boland; George Hawkins, another loan officer at the Bank; and Lilien.

87. As of July 5, 1973, Romano ended his association with American IBC and resumed business on his own.

88. On July 24, 1973, Romano wrote Boland to inform him of his change in status.

89. In or about July, 1973, Romano told Joshua Yedid, an officer of Republic National Bank, that American IBC was suffering severe financial problems and warned him not to do any business with American IBC.

90. In the spring of 1973, Romano told Charles Mason, an officer of The Chase Manhattan Bank, N.A., that he had doubts about the financial condition of American IBC. Mason stated that he would check this information and shortly thereafter reported that he could find no reason to be concerned, which Mason later admitted was a mistake.

91. In August of 1973, Romano called and met with Jardine, Vice President of Wells Fargo Bank, N.A., in San Francisco, California.

92. At this time (August 1973) American IBC was indebted to the Bank in excess of $2,000,000, of which Wells Fargo, N.A. had a participating interest in the amount of $200,000.

93. No one at the Bank asked Romano why he had resigned, inquired of American IBC why he had resigned, made any other inquiries into the circumstances surrounding his resignation, or made any inquiry of Mr. Romano as to the business and affairs, or current financial position of American IBC.

94. On January 29, 1974, an involuntary petition in bankruptcy was filed against American IBC in the United States District Court for the Southern District of New York. On February 14, 1974, American IBC was duly adjudicated bankrupt and, on April 2, 1974, Alan B. Miller was appointed Trustee of the bankrupt estate.

95. The payment of $1,042,814.37 to the Bank on November 2, 1973, and the payment of $1,046,894.05 on November 19, 1973, were made within four months of the filing of a petition in bankruptcy against American IBC.

Dated: New York, New York
February 7, 1975

WEIL, GOTSHAL & MANGES

By______________________
A Member of the Firm

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(ZURCHER KOMMENTAR, 3RD ED. 1973) 236-242, 250-255

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AFFIDAVIT OF WERNER DE CAPITANI DATED DECEMBER 12, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------x

ALAN B. MILLER, as Trustee in Bankruptcy of AMERICAN IBC CORP., Bankrupt, :

Plaintiff, :

-against- :

WELLS FARGO BANK INTERNATIONAL CORPORATION, :

Defendant. :

-----------------------------------x

74 Civ. 3714 (M.P)

AFFIDAVIT

Werner de Capitani, residing at 116 Langackerstrasse, CH-8704 Herrliberg, being duly sworn, deposes and states as follows:

1. I am an attorney admitted to the Bar of the Canton of Zurich (Switzerland) and have been practicing in Zurich for 14 years. I am fully conversant with Swiss law.

2. A telex message dispatched by Sheldon Silverston, President of American IBC Corp., New York, to Swiss Credit Bank, Zurich, reads in its relevant sections:

> Quote
>
> 2. UCB Nov. 13 paying you 3'182'557.83 Swiss Francs representing 3'130'000.-- principal and 52'557.83 interest.
>
> 3. This sum of 3'182'557.83 Swiss Francs sold you value 19 Nov. 1973 per our conversation with Mr. Ribi and second telex of May 15 to Mr. Ribi attn. at rate of 3.04 meaning for Dlr. 1'046'894.05.
>
> 4. Kindly utilize these dollars to repay all

> dollar advances (and interest thereon) made to American IBC Corp.
>
> Unquote.

The question is whether this telex constitutes an assignment under Swiss law.

3. According to the Swiss law of conflicts of laws, the question of whether a certain declaration constitutes an assignment is determined according to the law of the country which governs the underlying contract (Schuldstatut). In the absence of a choice of law by the parties, the point of contact is the performance which is typical for the contract. In the case of an assignment of a debt, the typical performance is the payment by the debtor. Accordingly, it is the law of the country of the debtor's domicile which is applicable.

Usually, the foregoing is concentrated into the short and easily understanding formula that the applicable law is the law of the domicile of the party whose performance is typical for the contract.

Citations: The two leading treatises are

- Vischer, Internationales Privatrecht, in: Schweizerisches Privatrecht, ed. Gutzwiller et al. (1969) p. 511-709 .
- Schoenenberger/Jaggi, Obligationenrecht (Zurcher Kommentar, 3rd ed. 1973)

Concerning the point of contact in general see Vischer, § 80 p. 672; Schonenberger/Jaggi, General Introduction ann. 236-242, p. 88-90; ann. 250-255, p. 93-95. Annexed hereto as Exhibits 1 and 2 respectively are copies of the aforesaid authorities. Concerning the point of contact for an assignment see Vischer § 88 p. 706-707; Schoenenberger/Jaggi, General Introduction ann. 375-378, p. 138-139. Both authors cite the same cases (decisions by the Swiss Federal Court) on which their opinions are based. Recently, the Swiss Federal Court has confirmed its practice (BGE 98 (1972) II 238). Annexed hereto as Exhibits 3 and 4 respectively are copies of the aforesaid authorities.

4. The telex message quoted under (2) above deals with a debt of UCB which, I understand, is a non-Swiss bank with its concerned office outside of Switzerland. Accordingly, an assignment with respect to such debt is not subject to Swiss law.

5. Assuming, however, that the debt is located in Switzerland and, accordingly, the assignment is governed by Swiss law, the following remarks apply:

The assignment is regulated by articles 164-174 of the Swiss Code of Obligations (CO). Copies of the text of the law and of a reliable translation are attached hereto as Exhibit 5.

There are two compelling reasons, why the wording of the telex does not constitute a valid assignment.

(a) On the formal side, art. 165 CO rules that the assignment must be in writing. What "in writing" means, is put down in art. 12 - 15 CO; copies of these sections and of the translation are attached hereto as Exhibit 6. According to art. 13, a contract must bear the handwritten signatures of all persons who are bound. In the case of an assignment, only the assignor is bound. His signature only must appear on the document.

Art. 13 par. 2 CO provides an exception from this principle: a telegram is considered in writing, if its original bears the signature of the person who binds himself. Telegrams are dispatched in Switzerland by the PTT, an agency of the Swiss Government. Telegrams are given up at the Post Office on a form which must be signed by the sender. Accordingly, there is always a document with the signature of the sender. The same is not true in the case of telexes. Telex machines are frequently installed in private offices. There is no guarantee that a form with the signature of the sender is available. For this reason, art. 13 par. 2 CO cannot be construed to embrace telexes. See Schonenberger/Jaggi (same treaty as cited under (3) above) ann 70-72 ad art. 13 CO, p. 568-69. Annexed hereto as Exhibit 7 is a copy of the aforesaid authority.

Accordingly, the telex cannot constitute a valid assignment under Swiss law because of non-compliance with a formal requirement.

It should be added that, according to the Swiss doctrine, the form of an assignment is subject to the law which is applicable at the place where the assignment is made or to the law which the law at the place where the assignment is made declares applicable. (BGE 98 (1972) II 238.

(b) But also from the angle of substantive law, the telex could not be regarded to contain an assignment. It is necessary that the wording reflects unequivocally the intention of a party to assign a claim it has against another person to a third party. It is not necessary that it is expressly said "I hereby assign"; but the wording must be as clear as to exclude any doubt amongst the parties concerned about the intention of the assignment, but which was not understood by the assignee as such, was not an assignment (BGE 88 (1962) II 22-23).

In the telex of American IBC, the text of (2) is a simple message about a forthcoming payment and the text of (4) contains instructions to Swiss Credit Bank concerning the use of the sums of money in question. Neither can be construed to contain an assignment.

/s/ W. de Capitani
Werner de Capitani

Sworn to beforem me this
day of December, 1975

/s/

LLIAM J. ROCHELLE, III
Public, State of New York
No. 31-4614333
d In New York County
n Expires March 30, 1977

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EXHIBIT 1--TREATISE - VISCHER, INTERNATIONALES PRIVATRECHT,
IN: SCHWEIZERISCHES PRIVATRECHT, ED. GUTZWILLER
ET AL. (1969) §80 ANNEXED TO AFFIDAVIT OF WERNER
DE CAPITANI

rers geltende Recht hinweisen[35]. Hier sind sämtliche Versicherungsverträge des Versicherers zu einem Versicherungsbestand zusammengefaßt, der der staatlichen Kontrolle untersteht. Hinzu kommt, daß der Versicherungsvertrag in erheblichem Maße von öffentlich-rechtlichen Normen beherrscht ist, so daß auch hier kein Spielraum für die Rechtswahl der Parteien mehr besteht. Nur dort, wo ein Versicherungsvertrag nicht den Charakter eines Massenvertrages besitzt und nicht zum versicherungstechnischen Bestand einer Haupt- oder Zweigniederlassung gehört, ist eine Parteiwahl zulässig.

Die Grenze der kollisionsrechtlichen Parteiautonomie zeigt sich auch auf dem Gebiete des Kartellrechts. Den zwingenden oft öffentlich-rechtlichen Bestimmungen der nationalen Kartellgesetzgebungen, denen die Möglichkeit der effektiven Durchsetzung auf dem vom Geltungsbereich erfaßten Markt gegeben sind, können sich die Parteien durch Wahl eines anderen Rechts nicht immer entziehen. Für eigentliche Kartellverträge, deren wesentlichster Inhalt in der Beschränkung des Wettbewerbs auf einem bestimmten Markt besteht (im Unterschied zu Verträgen, bei welchen nur Nebenklauseln kartellrechtlichen Inhalt haben), erscheint eine Parteivereinbarung als wirkungslos, da der Vertrag bereits im Recht des Marktes lokalisiert ist, dessen Ordnung beeinflußt werden soll[36].

§ 80. Die objektive Anknüpfung

Literatur: F. Vischer, Methodologische Fragen bei der objektiven Anknüpfung im internationalen Vertragsrecht, SchwJahrb. 1957, S. 43ff.; H. W. Widmer, Die Bestimmung des maßgeblichen Rechts im internationalen Vertragsrecht, Diss. Zürich 1944; E. Rabel, Das Recht des Warenkaufs, Berlin 1957; A. von Sprecher, Der internationale Kauf, Abkommen und Abkommensentwürfe zur Vereinheitlichung der Kollisionsnormen des Kaufvertrags, Diss. Zürich 1957.

I. Die Anknüpfung an die typische Leistung des Vertrages

Nach den im § 78 erwähnten Grundsätzen untersteht ein Vertrag mangels einer gültigen Rechtswahl dem Recht am Wohnsitz des Erbringers der

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[35] M. Keller, Das internationale Versicherungsvertragsrecht der Schweiz, Bern 1962, S. 64/5.

[36] In gleicher Richtung geht der Vorschlag von R. Bär, Kartellrecht und IPR, Bern 1956, S. 217, der eine Sonderanknüpfung für Kartellverträge und daneben volle Rechtswahlfreiheit der Parteien vertritt.

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typischen Leistung. Richtiger ist es, an Stelle des rechtlich zu qualifizierenden Wohnsitzbegriffes den Begriff der résidence habituelle einzuführen[1].

Das zuständige Recht findet Anwendung auf den ganzen Vertrag[2]. Bei langdauernden Verträgen ist allerdings einer allfälligen Verschiebung des Anknüpfungspunktes Rechnung zu tragen, da sich darin eine Verschiebung des engsten räumlichen Zusammenhanges widerspiegelt[3].

II. Der Anknüpfungskatalog

Das Bundesgericht hat für die einzelnen Vertragstypen einen Katalog der jeweils typischen Leistung und damit des anwendbaren Rechts aufgestellt.

1. Veräußerungsverträge

a) Der Kaufvertrag untersteht dem Recht der résidence habituelle[4] des Verkäufers[5]. Die Nicht-Geldleistung wird als funktionell den Vertragstyp prägend betrachtet[6].

Auf diesem Grundsatz steht auch das Haager Abkommen über das auf den internationalen Warenkauf anwendbare Recht (Art. 3 Abs. 1).

Das Haager Abkommen enthält allerdings in Art. 3 Abs. 2 eine generelle Ausnahme zugunsten des Käuferrechts für alle Kaufverträge, die im Lande des Käufers abgeschlossen wurden[7]. Diese Ausnahmebestimmung stellt offensichtlich eine Kompromißformel zugunsten der romanischen Länder dar, die von der Maßgeblichkeit des Abschlußortes ausgehen. Der Vorbehalt erscheint in dieser Allgemeinheit nicht gerechtfertigt. Nur dort, wo ein Kauf

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[1] So Art. 2 Abs. 2 des Haager Abkommens von 1955 über das auf den internationalen Warenkauf anwendbare Recht. Vgl. oben S. 544 f.

[2] Dieses Erfordernis ist im Interesse der Rechtssicherheit streng zu handhaben. Bei kurzfristigen Verträgen ist der Anknüpfungspunkt im Zeitpunkt des Vertragsabschlusses maßgebend.

[3] Vgl. BGE 76 II, 1950, S. 45. Wie bei der nachträglichen Änderung der Rechtswahl der Parteien, so ist auch hier eine Rückwirkung des neuen Vertragsstatuts anzunehmen.

[4] Das Bundesgericht hat anders als im Scheidungsrecht (BGE 89 I, 1963, S. 314) im OR die Anknüpfung an den gewöhnlichen Aufenthaltsort der Anknüpfung an den Wohnsitz noch nicht gleichgesetzt.

[5] So BGE 77 II, 1951, S. 84, 272; 78 II, 1952, S. 78; 79 II, 1953, S. 165, 297; 88 II, 1962, S. 198, 326, 474; 91 II, 1965, S. 358.

[6] Anders K. F. Kreuzer, Das internationale Privatrecht des Warenkaufs in der deutschen Rechtsprechung, Frankfurt, Berlin 1964, S. 95 ff., der die Käuferleistung für die volkswirtschaftlich wichtigere und daher entscheidende Leistung hält.

[7] Vgl. Actes de la 6e session, S. 288, 317 und A. v. Sprecher, Der internationale Kauf (Abkommen und Abkommensentwürfe zur Vereinheitlichung der Kollisionsnormen des Kaufvertrages), Diss. Zürich 1957.

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sofort vollzogen wird (Kauf über den Ladentisch) und in ähnlichen Fällen ist eine Ausnahme zugunsten des Käuferrechts am Platz[8].

Grundstückkäufe unterstehen der lex rei sitae, welche auch für allfällige Vorverträge, Kauf- und Rückkaufsverträge maßgebend ist[9].

b) Der Alleinverkaufsvertrag[10] untersteht richtigerweise dem Recht des Vertreter-Käufers. Der Zweck des Vertrages besteht in erster Linie darin, Ware in einem anderen Land zu verteilen. Deshalb ist die Leistung des Vertreter-Käufers funktionell und wirtschaftlich bedeutender als die Leistung des Verkäufers[11].

c) Beim Tauschvertrag läßt sich eine typische Leistung generell nicht aufstellen. Eine Lösung kann nur von Fall zu Fall im Wege der Abwägung aller Elemente gefunden werden[12].

d) Die Schenkung untersteht dem Recht der résidence habituelle des Schenkers[13].

Bei den Veräußerungsverträgen stellt sich das Problem des auf den Eigentumsübergang anwendbaren Rechts[14]. Maßgebend ist die lex rei sitae im Zeitpunkt des Vertragsabschlusses[15]. Die Frage des Gefahrenübergangs untersteht dagegen dem Vertragsstatut.

2. Verträge auf Gebrauchsüberlassung

a) Für Miete, Pacht und Gebrauchsleihe gilt die Anknüpfung an das Recht des Vermieters, Verpächters oder Verleihers. Bei Miete und Pacht von Grundstücken ist die lex rei sitae maßgebend.

b) Beim Darlehen ist die Leistung des Darleihers die risikobeladene und als solche die typische Leistung des Vertrages[16].

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[8] Vgl. unten S. 679. Über Börsenkäufe und Käufe auf Messen und Märkten vgl. F. VISCHER, Internationales Vertragsrecht, S. 116.

[9] So W. SCHÖNENBERGER, Allgemeine Einleitung, N. 261. Anders M. GUTZWILLER, SchwJahrb. 1957, S. 281.

[10] Vgl. hiezu CH. WYNIGER, Vom Alleinverkaufsvertrag, insbes. im IPR der Schweiz, Diss. Bern 1963.

[11] BGE 88 II, 1962, S. 474. In seiner früheren Praxis wendet das Bundesgericht dagegen das Verkäuferrecht an, sofern nicht besondere Umstände für ein Überwiegen der Agenturtätigkeit sprachen. Vgl. BGE 78 II, 1952, S. 81 und 88 II, 1962, S. 326.

[12] Vgl. Urteil des Bundesgerichts i.S. Niedermann gegen Waldner vom 15.6.1949, SchwJahrb. 1950, S. 252ff. und W. SCHÖNENBERGER, Allgemeine Einleitung, N. 269.

[13] Vgl. A. SCHNITZER, Die Schenkung im IPR, SJZ. 1942, 3, S. 1ff., und W. SCHÖNENBERGER, Allgemeine Einleitung, N. 270ff.

[14] Vgl. hiezu ausführlich F. VISCHER, Internationales Vertragsrecht, S. 176ff.

[15] Vgl. oben S. 653f.

[16] So W. SCHÖNENBERGER, Allgemeine Einleitung, N. 230, A. SCHNITZER, Handbuch des IPR, 4. Aufl., S. 705, sowie BGE 59 II, 1933, S. 400; 78 II, 1952, S. 191; 87 II, 1961, S. 198. Früher knüpfte das Bundesgericht an den Wohnsitz des Borgers an: BGE 51 II, 1925, S. 305; 54 II, 1928,

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Internationale Anleihen[17] sind dagegen dem Recht am Emissionsort zu unterstellen, um eine einheitliche Behandlung der Gläubiger zu gewährleisten[18]. Wird die Anleihe in verschiedenen Staaten aufgelegt, so ist im Hinblick auf die in jedem Land bestehenden zwingenden Bestimmungen der jeweilige Emissionsort maßgeblich[19].

c) Der Lizenzvertrag untersteht dem Recht des Lizenzgebers. Nach den Umständen der vertraglichen Verpflichtungen (wie Ausführungspflicht), kann jedoch die Leistung des Lizenznehmers zur typischen werden, was zur Anwendung seines Rechts führen wird[20]. Der Ort der gelegenen Sache sollte gelten, wenn sich die Lizenz auf den Bau einer festen Anlage bezieht.

3. Verträge auf ein Tätigwerden

a) Beim Dienstvertrag ist die Leistung des Dienstpflichtigen, d.h. die Arbeitsleistung, die für den Vertrag typische. Im Gegensatz zur allgemeinen Regel, wonach an die résidence habituelle des Erbringers der typischen Leistung angeknüpft wird, liegt beim Dienstvertrag der Schwerpunkt am gewöhnlichen Arbeitsort[21]. Diese Anknüpfung ist schon im Hinblick auf die zahlreichen öffentlichrechtlichen Normen, die das Arbeitsrecht beherrschen und ihren Anwendungsbereich auf das Arbeitsrecht erstrecken, geboten[22].

b) Auch beim Werkvertrag[23] ist die Leistung des Tätigwerdenden die typische. Im Gegensatz zum Dienstvertrag ist hier jedoch der Arbeitsort nicht von maßgeblicher Bedeutung, weshalb an die résidence habituelle des Unternehmers anzuknüpfen ist[24].

S. 316; 60 II, 1934, S. 301; 61 II, 1935, S. 244; 63 II, 1937, S. 43. Nach deutscher Praxis ist maßgebend das Recht am Erfüllungsort des Borgers, d.h. am Ort der Rückzahlung.

[17] Vgl. hiezu W. Niederer, Kollisionsrechtliche Probleme bei internationalen Anleihen, Festgabe E. Grossmann, Zürich 1949, S. 274 ff.; R. Schmid, Kollisionsrechtliche Probleme bei internationalen Darlehen und Anleihen, Diss. Zürich 1954; G. van Hecke, Problèmes juridiques des emprunts internationaux, Bibliotheca Visseriana, Bd. 18, 1955.

[18] So BGE 68 II, 1942, S. 208; 88 II, 1962, S. 286. Anders früher 54 II, 1928, S. 265; 57 II, 1931, S. 72; 59 II, 1933, S. 362; 62 II, 1936, S. 142; 64 II, 1938, S. 88, wo das Recht der in Anspruch genommenen Zahlstelle angewendet wurde.

[19] Andere Lösungen vertreten W. Niederer, Festgabe E. Grossmann, S. 282, und A. Schnitzer, Handbuch des IPR, 4. Aufl., S. 708.

[20] Vgl. A. Troller, Das internationale Privat- und Zivilprozeßrecht im gewerblichen Rechtsschutz und Urheberrecht, Basel 1952, S. 196.

[21] Vorübergehende Beschäftigung an einem andern Ort rechtfertigt keine abweichende Anknüpfung. Bei leitenden Angestellten liegt dagegen der Schwerpunkt des Vertrages am Sitz des Unternehmens.

[22] Vgl. F. Gamillscheg, Internationales Arbeitsrecht, Berlin 1959, sowie W. Schönenberger, Allgemeine Einleitung, N. 384 ff.

[23] Vgl. E. Eichler, Der Werkvertrag im IPR, Diss. Basel (Maschinenschrift) 1961.

[24] Dies gilt auch bei Werken, die auf Grundstücken zu erstellen sind. Anders W. Schönenberger, Allgemeine Einleitung, N. 285, wo zu Unrecht die Verwendung der lex rei sitae vertreten wird.

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c) Verwandt mit dem Werkvertrag ist der Verlagsvertrag, bei dem die Leistung des Verlegers die typische und der Vertrag dementsprechend dem Recht am Geschäftssitz des Verlegers zu unterstellen ist[25].

d) Der Auftrag untersteht dem Recht der résidence habituelle des Beauftragten[26]. Kennt dieses nur den unentgeltlichen Auftrag und liegt nach schweizerischem Recht ein entgeltlicher Auftrag vor, so ist dieser wie ein entsprechendes entgeltliches Arbeitsverhältnis des betreffenden Rechts zu behandeln[27].

Die Geschäftsführung ohne Auftrag ist analog zum Auftrag an das Recht des Tätigwerdenden anzuknüpfen[28].

e) Bei Anweisung, Kreditbrief, Kreditauftrag und Akkreditiv ist die Leistung des Angewiesenen, der Akkreditivbank die für das Verhältnis typische. Sein Recht beherrscht richtigerweise sowohl das Verhältnis zwischen Angewiesenem und Anweisungsempfänger (Akkreditivbank–Akkreditierter) als auch das Deckungsverhältnis zwischen Anweisendem und Angewiesenem, während das Valutaverhältnis zwischen Anweisendem und Anweisungsempfänger sich nach dem für das Grundgeschäft maßgeblichen Recht beurteilt[29].

f) Der Mäklervertrag untersteht dem Recht des Mäklers[30].

g) Für Trödlerverträge gilt das Recht des Trödlers[31].

h) Der Agenturvertrag untersteht gemäß Art. 418b Abs. 2 OR dem schweizerischen Recht, sofern sich das Tätigkeitsgebiet des Agenten in der Schweiz befindet. Das Bundesgericht hat diese Bestimmung zu einer ganzseitigen Kollisionsnorm erweitert[32]. Um einer Zerreißung des Vertrages vorzubeu-

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[25] Vgl. W. SCHÖNENBERGER, Allgemeine Einleitung, N. 289; A. SCHNITZER, Handbuch des IPR, 4. Aufl., S. 314f.; A. TROLLER, Das internationale Privat- und Zivilprozeßrecht im gewerblichen Rechtsschutz- und Urheberrecht, S. 221ff.

[26] Anders BGE 67 II, 1941, S. 181; 77 II, 1951, S. 92 und neuerdings 91 II, 1965, S. 446 (Anknüpfung an den Erfüllungsort des Beauftragten).

[27] W. SCHÖNENBERGER, Allgemeine Einleitung, N. 290.

[28] So W. SCHÖNENBERGER, Allgemeine Einleitung, N. 302 und A. SCHNITZER, Handbuch des IPR, 4. Aufl., S. 716. Anders M. GUTZWILLER, Internationalprivatrecht, S. 1624, der an den Wohnort des Geschäftsherrn anknüpfen will.

[29] Richtig BGE 78 II, 1952, S. 47, und 87 II, 1961, S. 237. Ebenso W. SCHÖNENBERGER, Allgemeine Einleitung, N. 309.

[30] Vgl. BGE 62 II, 1936, S. 110. Für Börsenmakler gilt das Recht am Ort der Börse, für Grundstückmakler dagegen nicht die lex rei sitae.

[31] BGE 89 II, 1963, S. 216.

[32] BGE 65 II, 1939, S. 169; 76 II, 1950, S. 45; 78 II, 1952, S. 74. Zustimmend B. LEEMANN, Die kollisionsrechtliche Bedeutung von Art. 418b Abs. 2 OR, Diss. Zürich 1955, S. 47f.

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gen, wenn der Agent in mehreren Ländern tätig ist, ist die Anknüpfung an den Geschäftssitz des Agenten vorzuziehen[33].

i) Kommission, Spedition und Frachtvertrag werden wie die übrigen Dienstleistungsverträge angeknüpft, d.h. maßgebend ist das Recht des Tätigwerdenden, des Kommissionärs, Spediteurs oder Frachtführers[34]. Verschiedene Arten von Frachtverträgen sind allerdings bereits durch internationale Abkommen geregelt, die der allgemeinen Anknüpfungsregel vorgehen[35].

4. Verträge auf Verwahrung und Sicherung

a) Verträge auf Verwahrung und Sicherung einer körperlichen Sache wie Hinterlegungsvertrag, Lagergeschäft und Depositum irregulare sowie ferner der Beherbergungsvertrag unterstehen dem Recht des Ortes, wo die typische Leistung, die Verwahrung, geschuldet wird. Bei Lagerhäusern, Banken usw. erlaubt dies die erwünschte Anknüpfung ihrer Massenverträge am Orte ihres Geschäftssitzes.

b) Die Bürgschaft ist an die résidence habituelle des Bürgen anzuknüpfen, da seine Stellung die für den Vertrag charakteristische ist. Trotz ihrer Abhängigkeit von der Hauptschuld wird die Bürgschaft nach schweizerischem Kollisionsrecht selbständig angeknüpft und nicht dem Recht der Hauptschuld unterstellt, das lediglich bestimmt, was der Bürge zu leisten hat, falls er nach Bürgschaftsstatut zur Leistung verpflichtet ist[36].

c) Untersteht die Bürgschaft ihrem eigenen Statut, so ist dies um so eher der Fall beim Garantievertrag, der nicht akzessorisch ist und richtigerweise an die résidence habituelle des Garanten angeknüpft wird[37]. Im Gegensatz

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[33] So auch W. Schönenberger, Allgemeine Einleitung, N. 297.

[34] BGE 36 II, 1910, S. 368; 48 II, 1922, S. 260; 88 II, 1962, S. 430 (Spedition) und 44 II, 1918, S. 280; 48 II, 1922, S. 337; 74 II, 1948, S. 85; 83 II, 1957, S. 231; 85 II, 1959, S. 209, 267 (Frachtvertrag). Vgl. W. Schönenberger, Allgemeine Einleitung, N. 299 ff., und 303 ff. Ferner H. Stoll, Kollisionsrechtliche Fragen beim Kommissionsgeschäft, RabelsZ 24, 1959, S. 601 ff., und R. Truffer, La loi applicable au contrat de transport international de marchandises selon la règle suisse de conflit, Diss. Lausanne 1958.

[35] Vgl. F. Vischer, Internationales Vertragsrecht, S. 123, und W. Schönenberger, Allgemeine Einleitung, N. 305 ff.

[36] BGE 25, 1899, S. 755; 53 II, 1927, S. 347; 60 II, 1934, S. 302; 61 II, 1935, S. 183; 63 II, 1937, S. 308; 64 II, 1938, S. 349; 65 II, 1939, S. 81; 67 II, 1941, S. 219; 85 II, 1959, S. 272. So auch W. Schönenberger, Allgemeine Einleitung, N. 312/13; A. Schnitzer, Handbuch des IPR, 4. Aufl., S. 744; E. Beck, Die Bürgschaft im IPR der Schweiz, ZBJV 71, 1935, S. 514 ff. Anders M. Gutzwiller, SchwJahrb. 1946, S. 249/50. Vgl. insbesondere für die Fragen der Form eingehend F. Vischer, Internationales Vertragsrecht, S. 126/27. Öffentliche Beurkundung und Angabe des Höchstbetrages der Bürgenhaftung werden vom Bundesgericht nicht als um des schweizerischen Ordre public willen aufgestellte Vorschriften betrachtet (BGE 93 II, 1967, S. 384).

[37] BGE 67 II, 1941, S. 219 f.; 76 II, 1950, S. 35 f.; 85 II, 1959, S. 454.

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dazu gilt für die Konventionalstrafe das Recht der zu sichernden Hauptverpflichtung.

5. Aleatorische Verträge

a) Spiel und Wette unterstehen dem Recht am Ort ihrer Durchführung, da bei diesen Verträgen naturgemäß beide Parteien das gleiche Risiko auf sich nehmen und daher keine die Anknüpfung vermittelnde typische Leistung festgestellt werden kann.

b) Beim Leibrentenvertrag und der Verpfründung vermittelt die Leistung des Rentenschuldners bzw. des Pfrundgebers die Anknüpfung.

c) Zu den aleatorischen Verträgen gehört auch der Versicherungsvertrag, bei dem der Versicherer die typische Leistung erbringt[38]. Wird die Versicherung von einer Zweigniederlassung des Versicherers abgeschlossen, so gilt das Recht am Ort der Zweigniederlassung[39].

6. **Gesellschaftsverträge** sind an die résidence habituelle desjenigen Gesellschafters anzuknüpfen, der in erster Linie für die Geschäfte der Gesellschaft besorgt ist. Im Zweifel wird das Zentrum der Gesellschaftsaktivität ausschlaggebend sein[40].

Kollektivgesellschaften hat das Bundesgericht bis jetzt dem Recht am Gesellschaftssitz unterstellt[41]. M.E. wäre es richtiger, Kollektivgesellschaften der gleichen Anknüpfung wie juristische Personen zu unterziehen. Sie sind in zahlreichen Rechtsordnungen eine juristische Person im eigentlichen Sinne. Die Anwendung der Inkorporationstheorie[42] würde zur Maßgeblichkeit des Rechts führen, unter welchem die Eintragungsformalitäten erfüllt wurden oder, wo solche nicht verlangt sind, nach welchem sich die Gründung vollzog.

Für die Anknüpfung der juristischen Personen vgl. S. 569ff.

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[38] BGE 16, 1890, S.372; 20, 1894, S.167, 189; 51 II, 1925, S.409; 53 II, 1927, S.78; 57 II, 1931, S.597; 70 II, 1944, S.279; 71 II, 1945, S.289; 72 III, 1946, S.54; 79 II, 1933, S.193; 85 II, 1959, S.231. Vgl. H.U. Ryser, Der Versicherungsvertrag im IPR, Diss. Bern 1957, und M. Keller, Das internationale Versicherungsrecht der Schweiz, Bern 1962. Für die Anknüpfung des Versicherungsvertrags im Ausland vgl. F. Vischer, Internationales Vertragsrecht, S.128.

[39] BGE 71 II, 1945, S.291; 72 III, 1946, S.54; 79 II, 1953, S.193.

[40] BGE 78 II, 1952, S.148; 87 II, 1961, S.270ff. Vgl. W.v. Steiger, Die einfache Gesellschaft im IPR, SchwJahrb. 1957, S.17ff. Ferner F. Vischer, Internationale Kartellvereinbarungen im schweizerischen Privatrecht, Schweiz. Beiträge zum 4. Kongreß für Rechtsvergleichung 1954, S.95-98.

[41] BGE 37 II, 1911, S.374; 83 II, 1959, S.453.

[42] Vgl. oben S. 569ff.

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III. Die atypischen Verträge

1. Der Katalog der typischen Verträge beschränkt sich nicht auf die durch das Obligationenrecht ausdrücklich geregelten Vertragstypen. Die Praxis hat weitere typische Verträge entwickelt, für die auch vorbestimmte Anknüpfungskriterien gelten (z.B. Alleinverkaufsvertrag, Lizenzvertrag, Trödlervertrag).

2. Wo von einem typischen Vertrag nicht gesprochen werden kann, ist nach den allgemeinen Methoden zu fragen, welche Leistung als typisch anzusehen ist. Der Vertrag ist der résidence habituelle des Erbringers der typischen Leistung zu unterstellen. Nur wo sich eine typische Leistung nicht feststellen läßt, ist unter Herbeiziehung aller Vertragsumstände der objektive Schwerpunkt des Vertrages zu ermitteln[43].

IV. Die Ausnahmen von der Anknüpfung an die typische Leistung des Vertrages

1. Grundsätzlich gilt die vom Bundesgericht entwickelte Anknüpfungsregel. Immerhin können, wie das Bundesgericht in BGE 78 II, 1952, S. 191 ausführt, «einmal gegebene konkrete Umstände die räumliche Verknüpfung des Rechtsverhältnisses mit einem anderen Recht nahelegen». Diese Ausnahmeklausel ist allerdings im Interesse der Rechtssicherheit eng auszulegen. Es müssen eindeutige Umstände vorliegen, welche der normalen Anknüpfung die innere Rechtfertigung entziehen. Die Verbindlichkeit der normalen Kollisionsnormen endet erst dort, wo das Resultat beim konkreten Fall im offenen Widerspruch zur Ratio der Norm stehen würde.

2. Beispielsweise sei an folgende Fälle gedacht:

a) Wird ein Rechtsgeschäft in einem Land abgeschlossen und sofort daselbst auch vollzogen, so tritt das Recht des Erbringers der typischen Leistung zurück hinter dem Umweltsrecht, in dessen Sphäre sich das gesamte Vertragsgeschehen abwickelt (z.B. der sog. Kauf über den Ladentisch).

b) Eine weitere Ausnahme rechtfertigt sich, wenn der eigentliche Anknüpfungspunkt zufällig oder zeitlich sehr begrenzt ist.

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[43] Vgl. F. Vischer, Internationales Vertragsrecht, S. 143. Über die richterliche Fortbildung der Kollisionsnormen vgl. O. Sandrock, Zur ergänzenden Vertragsauslegung im materiellen und internationalen Schuldrecht, S. 244ff.

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Dies war der Fall in BGE 78 II, 1952, S. 191, in welchem die Familie des Darleihers, eines aus Polen geflüchteten Schweizers, bereits in der Schweiz lebte, während der Darleiher im entscheidenden Moment lediglich noch darum in Konstanz weilte, um dort seinen Lebensunterhalt aus seinem aus Polen geretteten, in Reichsmark angelegten und in Deutschland blockierten Vermögen zu bestreiten. Hinzu kam, daß auch der Borger in Konstanz nur auf die Einreiseerlaubnis in die Schweiz wartete.

c) Bildet ein Vertrag mit anderen bereits anderswo lokalisierten Verträgen ein Ganzes, so ist die Anwendung eines einheitlichen Rechtes geboten. Eine solche Ausnahme ist in erster Linie dort anzunehmen, wo der in Frage stehende Vertrag der Vorbereitung, Erfüllung und Abänderung eines Hauptvertrages dient. Wo jedoch einfach mehrere Verträge das gleiche Ziel verfolgen, ist die ordentliche Anknüpfung jedes einzelnen Vertrages durchzuführen[44].

d) Schließlich hat die ordentliche Anknüpfung dort zurückzutreten, wo der Vertrag an einem anderen Ort bereits eindeutig lokalisiert ist.

Als Beispiel hierfür ist der in BGE 67 II, 1941, S. 215ff. entschiedene Fall eines Garantievertrags zu nennen. Währung, Vertragssprache, Erfüllungsort, das Statut des Grundgeschäfts und die Tatsache, daß der Garant seine Verpflichtung im Rahmen eines von einer New Yorker Bank geleiteten Bankenkonsortiums übernommen hatte, wiesen auf das amerikanische Recht hin. In Anbetracht dieser Umstände konnte der engste räumliche Zusammenhang nicht am ungarischen Wohnsitz des Garanten angenommen werden.

e) Wenn beide Parteien übereinstimmend von der Anwendbarkeit eines bestimmten Rechts ausgingen, ohne jedoch einen diesbezüglichen bewußten Rechtswahlwillen zu haben, so darf dies, will man nicht erneut in eine Anerkennung des hypothetischen Parteiwillens verfallen, nicht zur Annahme einer Ausnahme von der ordentlichen objektiven Anknüpfung führen. Subjektive Momente sind wohl nur so weit zu beachten, als der Vertrag auch objektiv seinen engsten räumlichen Zusammenhang mit einem anderen als dem von der ordentlichen Anknüpfungsregel bezeichneten Recht besitzt oder wenn das auf Grund der normalen Regel anwendbare Recht völlig außerhalb aller vernünftigen Erwartung der Parteien steht[45].

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[44] Vgl. F. Vischer, Internationales Vertragsrecht, S. 138ff.

[45] Vgl. den Entscheid des Bundesgerichts vom 18. Dez. 1951 i.S. Richner gegen Ringwald, wo zwei Schweizer in der Schweiz einen Dienstvertrag über eine Portierstellung in einem Hotel in Addis-Abeba abschlossen. Vgl. auch F. Vischer, Methodologische Fragen bei der objektiven Anknüpfung im internationalen Vertragsrecht, SchwJahrb. 1957, S. 56ff.

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EXHIBIT 2--TREATISE - SCHOENENBERGER/JAGGI, OBLIGATIONENRECHT
(ZURCHER KOMMENTAR, 3RD ED. 1973) 236-242, 250-255
ANNEXED TO AFFIDAVIT OF WERNER DE CAPITANI

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der Übergang zum Grundsatz der Anwendung eines einzigen Rechtes auf Entstehung und Wirkung des Vertrages, wiederum unter Benützung der Zwischenformel (vgl. oben N 225).

236 **g) Die jüngste Entwicklung der Rechtsprechung hinsichtlich der objektiven Anknüpfung: Weiterbildung der Zwischenformel; die Vertragstypenformel als künftige Lösung.** Bei der dargelegten Zwischenformel («engster räumlicher Zusammenhang des Rechtsverhältnisses») kann es nicht sein Bewenden haben. Sie führt zwangsläufig weiter, und zwar zur Vertragstypenformel. Diese Entwicklung zeichnet sich in der jüngsten Rechtsprechung bereits deutlich ab. Sie erklärt sich aus zwei Gründen: erstens aus dem Wesen der Zwischenformel, zweitens aus der nicht überhörbaren Forderung der Vertragspraxis, die mit allgemeinsten Formeln nichts anfangen kann und aus Gründen der Rechtssicherheit und der Voraussehbarkeit der Lösung präzise, konkrete und unmittelbar anwendbare Regeln verlangt (zu letzterem vgl. VISCHER, SchwJahrb 1957 S. 43 ff., 49 Die Zwischenformel des Bundesgerichts, die auf das Recht desjenigen Landes abstellt, mit dem das Vertragsverhältnis den engsten räumlichen Zusammenhang aufweist, bestimmt das maßgebliche Recht nun aber nicht unmittelbar (oben N 21 ist also auch in diesem besonderen Sinn nur eine «Zwischenformel». Sie ist im Grunde bloß ein Bild, wenn auch ein nützliches und hilfreiches, ähnlich wie das Abstellen auf den «Sitz» des Rechtsverhältnisses (SAVIGNY) oder die Ermittlung des «örtlichen Schwerpunktes» eines Vertrages (GIERKE). Sie bedeutet mehr eine Fragestellung als eine Antwort. Sie weist dem Suchenden nur allgemein die Richtung, ohne anzugeben, auf welche Gesichtspunkte es im einzelnen ankommt. Um zu praktisch unmittelbar brauchbaren Regeln zu gelangen, muß man ihr einen genaueren Inhalt geben, und das kann man nur so, daß man sie auf die einzelnen Vertragsarten zuschneidet, also zur Vertragstypenformel weiterbildet. Sonst legt jeder ihr den Sinn und Inhalt bei, der ihm im Einzelfall gerade paßt.

237 Hiefür wie für die Weiterentwicklung der Zwischenformel zum praktischen Gebrauch ist z. B. bezeichnend der Wandel der Meinung über die Bedeutung des Erfüllungsortes (der für den ganzen Vertrag charakteristischen Leistung) im Rahmen der Zwischenformel. Zuerst wurde (noch unter dem Einfluß der Theorie vom Erfüllungsort der einzelnen Leistung) erklärt, dem Erfüllungsort (der charakteristischen Leistung) komme unter den räumlichen Beziehungen eines Vertrages überwiegende Bedeutung zu, weshalb in der Regel das Recht dieses Erfüllungsortes als maßgebend zu betrachten sei, vgl. BGE 63 II 41, 307, 385, 72 II 411, 75 II 6 77 II 92, 191, 78 II 78, so auch noch NIEDERER, ZSR 1941 S. 301 a. Später wurde der Erfüllungsort aber zurückgedrängt und gerade beim wichtigsten Geschäft, dem Kaufvertrag, durch das Recht am *Wohnsitz* derjenigen Partei ersetzt, welche die für den Vertrag charakteristische Leistung zu erbringen hat, also Recht am Wohnort (Geschäftssitz) des Verkäufers, so BGE 77 II 84, 191, 78 II 78, 79 II 165

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297/98, ebenso **Stauffer**, ZBJV 1953 S. 392. Wird diese Entwicklung folgerichtig weitergeführt, so gelangt man zum allgemeinen (nicht auf den Kaufvertrag beschränkten) Satz, als Recht des engsten räumlichen Zusammenhanges eines Vertrages komme in der Regel das *Recht am Wohnsitz jener Partei* in Frage, *deren Leistung für den Vertrag charakteristisch* ist (so grundsätzlich auch **Stauffer** a.a.O., jedoch mit dem aus der Rechtsprechung über den Erfüllungsort übernommenen Zusatz, daß dies nur gelte, sofern nicht besondere Umstände zwingend auf ein anderes Recht verweisen; letzteres ist die Ausweichklausel, worüber unten N 240/42).

Die neuere Rechtsprechung trifft denn auch die gleiche Lösung für andere Verträge. So für den Alleinverkaufsvertrag BGE 78 II 81/82. Beim Auftrag und dem ihm nahestehenden Agenturvertrag gilt das Recht des Landes, wo der Beauftragte tätig ist (Art. 418 b Abs. 2 OR und oben N 224 am Ende, BGE 67 II 181, 217); bei Ausdehnung des Wirkungskreises (z. B. des Alleinvertreters) auf mehrere Länder dagegen das Recht am Wohnort bzw. Geschäftssitz des Beauftragten. Bei den praktisch wichtigen, gleichförmigen (formularmäßig abgeschlossenen) Massenverträgen (contrats d'adhésion), z. B. im Transport- und Speditionswesen, im Versicherungswesen (BGE 51 II 409, 71 II 289 f., 79 II 196), wird abgestellt auf das Recht am Ort der gewerblichen Niederlassung dieser Unternehmen (Betriebsort; das im Inland verzeigte Hauptdomizil von Versicherungsunternehmungen), vgl. BGE 74 II 85 (Frachtvertrag), n. p. BGE 20. 2. 1951 i. S. Frank AG gegen Frigaliment GmbH (Speditionsvertrag), n. p. BGE 16. 5. 1952 Airtrafic AG gegen Transocean Airlines Inc. (Lufttransportvertrag). Bei Darlehen (vorbehältlich gleichförmiger Massenverträge) gilt das Recht am Wohnsitz des Darlehensgebers, BGE 73 II 191. Bei einseitig verpflichtenden Verträgen wird auf das Wohnsitzland des die Hauptverpflichtung tragenden Schuldners abgestellt, z. B. bei abstrakter einseitiger Schuldverpflichtung (BGE 65 II 81), bei Bürgschaft (BGE 63 II 308, Wohnort des Bürgen), bei Garantievertrag (BGE 76 II 36/37, Wohnort oder Geschäftssitz des Garanten; vgl. auch BGE 85 II 453/51). 238

So ist also die Rechtsprechung auf dem Umweg über die Zwischenformel in der Hauptsache praktisch doch zur Vertragstypenformel gelangt, und es handelt sich nur darum, diesen eingeschlagenen (gemäß N 221, N 229, N 232, N 234 schon lange empfohlenen) Weg bis zum Ende weiterzugehen und für alle einzelnen Vertragsarten (trotz der von **Gamillscheg**, Archiv für civilistische Praxis 1958 S. 322, einstweilen noch gehegten Bedenken) die der Sach- und Interessenlage entsprechenden konkreten Kollisionsregeln aufzustellen: das geschieht unten in N 258—324. 239

h) Die Ausweichklausel. Nachdem praktisch der Übergang zum System der Vertragstypenformel vollzogen ist, stellt sich noch die oben N 213 und 237 angedeutete Frage, ob der Vertragstypenformel eine Ausweichklausel beizufügen sei, so wie sie der Zwischenformel des Bundesgerichts vom engsten räumlichen Zusam- 240

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menhang bisher angehängt war (oben N 237). Nach der Ausweichklausel gilt die normgemäße Anknüpfung, z. B. jene des engsten räumlichen Zusammenhanges, nur «in der Regel»; stets bleibt nach der Ausweichklausel die Ausnahme auf Grund besonderer Umstände des Einzelfalles vorbehalten, welche «zwingend» auf ein anderes als dieses regelgemäße Recht verweisen, eine «noch engere Verknüpfung» mit diesem andern Rechte ergeben, vgl. BGE 78 II 191 und die dort erwähnten Urteile, ebenso Stauffer, ZBJV 1953 S. 393. Diese Ausweichklausel (Ausnahmevorbehalt) ist freilich sehr unbestimmt; sie beeinträchtigt naturgemäß die Voraussehbarkeit der Entscheidung und damit die Rechtssicherheit, an welcher der Vertragspraxis so viel liegt. Im Grunde bedeutet sie eine Korrektur oder Einschränkung der Regel und ist eine Art Überregel, die gegenüber allen ordentlichen Regeln stets vorbehalten ist. Sie bezweckt, irgendwie den Einzelfällen gerecht zu werden, die anhand der ordentlichen, oft noch zu groben Regeln, als nicht befriedigend gelöst erscheinen. Die Ausweichklausel will, selbst im Rahmen der objektiven Anknüpfung, dem Richter eine gewisse Freiheit zu individueller Behandlung der Fälle verschaffen (Stauffer, ZBJV 1953 S. 393/94). Mit dieser Ausweichklausel versucht man also das zu erreichen, was man früher mit dem Behelf des (nach N 212 neuerdings verpönten) hypothetischen Parteiwillens erstrebte: Wo die Parteien eine Rechtswahl versäumten und wo die regelgemäße objektive Anknüpfung im Einzelfall ein unbefriedigendes Ergebnis zeitigen würde, weicht man dem aus, und zwar dadurch, daß der Richter an Stelle der Parteien die Rechtswahl vornimmt unter Berücksichtigung der erkennbaren Interessen der Parteien, wohl auch unter Beachtung objektiver Gesichtspunkte und nach der Eigenart des vorliegenden Vertragstypus.

Die Ausweichklausel ist auch unter dem System der Vertragstypenformel beizubehalten. Wie die Erfahrung zeigt, kommt die Rechtsprechung ohne einen solchen (oder andern) Behelf nicht aus. Keines der in N 191 erwähnten Grundpostulate läßt sich uneingeschränkt verwirklichen; eine mittlere Lösung drängt sich auf, welche eine immerhin sehr weitgehende Voraussehbarkeit gewährleistet; sie besteht in der Vertragstypenformel, ergänzt durch die Ausweichklausel. (Gamillscheg, Rechtswahl, Schwerpunkt und mutmaßlicher Parteiwille im internationalen Vertragsrecht, Archiv für civilistische Praxis 1958/59, S. 303 f., 323/41, erstrebt dasselbe Resultat neuerdings mit der Wiedereinführung des mutmaßlichen Parteiwillens gestützt auf ergänzende Vertragsauslegung, recte Vertragsergänzung; ähnlich Kegel 210.)

241 Es wäre denkbar, die objektiven Anknüpfungsregeln als ausnahmslose, also ohne Ausweichklausel, aufzustellen; so verhält es sich z. B. nach dem Haager Abkommen von 1955 über das IPR des Fahrniskaufes. Dabei ist zu bemerken, daß es noch keine Ausnahme von der Regel bedeutet, wenn sie nicht auf atypische Fälle angewendet wird, da auch die Normen des IPR, z. B. jene über die objektive Anknüpfung, grundsätzlich nur für die von der Regel vorausgesetzten Normalfälle gelten wollen.

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242 Anderseits bleibt auch im IPR wie im materiellen Recht gegenüber den gesetzlichen oder richterlich geschaffenen Normen stets der Fall der sog. Ausnahmelücke vorzubehalten (BGE 60 II 186, 71 II 121), also die Ablehnung der Unterstellung eines formell unterstellbaren Falles unter die Norm, weil deren Anwendung zu einem derart stoßenden Ergebnis führen würde, daß dies mit Sinn und Zweck der Norm unvereinbar erscheint. Es gibt solche Ausnahmen aus subjektiven oder aus objektiven Gründen, wie F. VISCHER, SchwJahrb 1957 S. 56 f. zutreffend dargelegt hat. Beispiel für subjektive Ausnahmen: BGE 18. 12. 1951 Richner/Ringwald (Vertragsabschluß zwischen zwei Schweizern in der Schweiz betreffend Anstellung in ein Hotel nach Abessinien; schweizerisches Recht). Beispiele für objektive Ausnahmefälle sind die sog. Käufe über den Ladentisch (Recht des Abschlußortes, selbst wenn keine der Parteien hier ihren Wohnsitz hat). BGE 67 II 220 (Sonderfall eines Garantievertrages). 78 II 191 (Sonderfall von Darlehen; Kritik der Begründung bei GAMILLSCHEG, Archiv für civilistische Praxis 1958/59 S. 339), weitere Beispiele bei VISCHER a.a.O. 63 f. Für derartige Ausnahmefälle bedürfte es, streng genommen, keines ausdrücklichen Vorbehaltes, da sie nach allgemeinen Auslegungsregeln stets vorbehalten sind.

3. Zusammenfassung der heute geltenden allgemeinen Grundsätze zur Bestimmung des maßgeblichen Rechtes für Schuldverträge.

243 **a) Die Rechtswahl durch die Parteien, d. h. subjektive Anknüpfung des maßgeblichen Rechtes** (N 217—N 234). Nach schweizerischem IPR beurteilt sich ein Schuldvertrag in erster Linie nach dem von den Parteien bewußt vereinbarten Recht (N 198).

244 Ob diese Rechtswahl unbegrenzt oder nur in bestimmten Schranken zulässig ist, bestimmt die gesetzliche (bei deren Fehlen die richterliche) Kollisionsnorm (N 199). Das Bundesgericht läßt gemäß BGE 78 II 86 jede Rechtsordnung zu, für deren Wahl ein vernünftiges Interesse der Parteien spricht oder die in guten Treuen gewählt wurde, Teilverweisung ist zulässig (N 200).

245 Nach richtiger Auffassung ist die Rechtswahl ein eigentlicher Vertrag (kollisionsrechtlicher Verweisungsvertrag). N 202, N 198. Zu einem Verweisungsvertrag genügt nicht schon eine bloß tatsächliche Vorstellung der Parteien über das anwendbare Recht, N 202 und BGE 81 II 176, 79 II 299 f. Die Gültigkeit des Verweisungsvertrages (Willensmängel usw.) beurteilt sich nach der die Rechtswahl vorsehenden Kollisionsnorm, ergänzend nach der lex fori (N 202).

246 Eine besondere Form wird für den Verweisungsvertrag nicht verlangt. Die Rechtswahl kann daher ausdrücklich oder stillschweigend getroffen werden (N 203). Stillschweigende Rechtswahl darf nur dort angenommen werden, wo bestimmte Umstände den Schluß auf einen wirklich vorhandenen Parteiwillen erlauben (N 203 und BGE 82 II 552/53). Ein sog. hypothetischer Parteiwille ist kein wirklicher

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Wille und genügt nicht. N 212 und BGE 78 II 78/79. Zur Frage, ob die Vereinbarung eines Gerichtsstandes oder eines Schiedsgerichtes für Rechtswahl spricht, siehe N 203. Über die Bedeutung des Umstandes, daß die Parteien im Prozeß übereinstimmend vom inländischen Recht ausgehen, siehe unten N 217/18.

247 Hinsichtlich des Zeitpunktes der Rechtswahl ging das Bundesgericht bis zu BGE 79 II 288 f. vom Grundsatz aus, daß der Parteiwille zur Zeit des Vertragsabschlusses entscheidend sei (Hinweise in N 204). Im Gegensatz zur älteren Rechtsprechung (N 204) hat das Bundesgericht seit BGE 47 II 551/53, 62 II 125/26 ständig verneint, daß solche Bezugnahme auf inländisches Recht im Prozeß für sich allein den Beweis für eine dahingehende Parteivereinbarung bei Vertragsabschluß erbringe (Näheres in N 204). Es steht nun aber grundsätzlich nichts im Wege (N 205), eine bei Vertragsschluß unterlassene Rechtswahl später nachzuholen oder eine frühere Rechtswahl durch eine neue Rechtswahl zu ersetzen (N 206/07); so nun entgegen früherer Rechtsprechung auch BGE 79 II 299 f., 301 f. Eine solche nachträgliche Rechtswahl kann ausdrücklich oder stillschweigend erfolgen, und es gilt dafür das in N 203 Gesagte.

248 Seit dieser Wandlung der Rechtsprechung frägt sich erneut, ob dem Umstande, daß die Parteien im Prozeß auf inländisches Recht Bezug nehmen, die Bedeutung einer stillschweigenden Rechtswahl (N 203/04) zukommt. Das kann zum vorneherein nur dann angenommen werden, wenn sich die Parteien überhaupt bewußt geworden sind, daß sich für ihren Vertrag die Frage nach dem maßgeblichen Rechte stellt (dieses Bewußtsein fehlt erfahrungsgemäß sehr oft, wenn die Parteien ohne besondere Motivierung sozusagen gewohnheitsmäßig im Prozeß vom schweizerischen Recht ausgehen). Im übrigen muß man unterscheiden: Wo die Bezugnahme auf schweizerisches Recht unter Übergehung einer ursprünglich getroffenen Rechtswahl erfolgt, kann man sie schlüssig als neue Rechtswahl ansehen. Wo dagegen früher keine Rechtswahl getroffen war, ist es fraglich, ob die Bezugnahme auf schweizerisches Recht, für sich allein, eine wirkliche Rechtswahl darstellt. Dies ist grundsätzlich zu verneinen; denn indem die Parteien von der inländischen Rechtsordnung ausgehen, äußern sie nur die Vorstellung, daß diese maßgebend sei, nicht aber den gemeinsamen Willen, daß diese (an Stelle des objektiv zuständigen Rechtes) maßgebend sein soll. Eine bloße Vorstellung ist aber kein Vertrag. Ein Verweisungsvertrag erfordert, daß die Parteien einen *bewußten* Rechtswahl-Willen hatten und diesen *äußern* wollten (N 203, N 210). Im Einzelfall können aber besondere Umstände hinzutreten, die es rechtfertigen, die Bezugnahme auf inländisches Recht als stillschweigende Rechtswahl aufzufassen. Zur Frage, ob es möglich ist, im Berufungsverfahren vor Bundesgericht noch abzuklären, ob bloß eine auf beiden Seiten vorhandene (richtige oder falsche) Vorstellung oder aber ein wirklicher Vertragswille (N 203, N 210) vorliege, siehe N 210. Die Rechtsprechung seit BGE 79 II 295, 80 II 46/47, 50, 180, 81 II 176, 82 II 553 betrachtet indessen solches Verhalten ohne weitere Prüfung als wirkliche Rechtswahl, was zu weit geht und im

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Grunde wieder auf die verpönte Unterstellung eines hypothetischen Parteiwillens hinausläuft (N 211). Zu beachten ist die Lösung nach Art. 2 des Haager Kaufrechtsabkommens von 1955, wonach die Rechtswahl ausdrücklich getroffen oder «unzweifelhaft» aus den Vertragsbestimmungen hervorgehen muß.

Der sog. hypothetische Parteiwille ist kein wirklicher Parteiwille und daher als 249 Anknüpfungsmittel abzulehnen, vgl. N 212 und BGE 73 II 78/79; siehe aber auch N 240 (Ausweichklausel).

b) Die objektive Anknüpfung (N 213—N 242). Beim Fehlen einer Rechts- 250 wahl durch die Parteien bestimmt sich das für Schuldverträge maßgebliche Recht auf Grund objektiver Anknüpfung. Die Bestimmung des Vertragsstatuts kann auf grundsätzlich verschiedene Art erfolgen; erstens nach der (abzulehnenden) Generalformel, wonach das maßgebliche Recht für sämtliche Verträge anhand einer einzigen Anknüpfung zum voraus bezeichnet wird (N 215), zweitens nach der (ebenfalls abzulehnenden) kasuistischen oder individualistischen Methode, wonach keine vorausbestimmte Anknüpfung entscheidet, sondern nachträglich für jeden einzelnen Vertrag unter Würdigung der Umstände des Einzelfalles das maßgebliche Recht durch den Richter bestimmt wird (N 216), drittens (richtig) nach der Vertragstypenformel, welche für jede Vertragsart (Vertragstyp, Vertragskategorie) zum voraus das maßgebliche Recht bestimmt, jedoch unter Berücksichtigung der Eigentümlichkeiten jeder Vertragsart (N 217). Eine Spielart der Vertragstypenformel bedeutet es, wenn mit ihr die Ausweichklausel verbunden wird, derzufolge die Vertragstypenformel zwar als Regel gilt, von ihr aber abgewichen werden kann, wenn «besondere Umstände des Falles zwingend auf ein anderes Recht verweisen» (N 218, N 240).

Die Stellungnahme des Bundesgerichts zu den herkömmlichen Anknüpfungs- 251 begriffen (N 213) und zu den Anknüpfungsmethoden (N 214/19) hat sich wiederholt gewandelt, in der Hauptsache aber im Rahmen der Auseinandersetzung mit dem Problem der Vertragsspaltung herausgebildet (N 220). Die Vertragsspaltung ist grundsätzlich abzulehnen. Das Wesen des Schuldvertrages erfordert, daß der einzelne Vertrag auch im IPR als Einheit behandelt und als Ganzes einem einzigen Recht unterstellt wird (N 221/22).

Diesem Grundsatze widerspricht die sog. große Vertragsspaltung (Unterstellung 252 des Vertragsabschlusses einerseits und der Vertragswirkungen anderseits unter verschiedenes Recht), zu welcher sich die bundesgerichtliche Rechtsprechung seit 1906 bekannt hat. Erst in BGE 78 (1952) II 81/85 ist die große Vertragsspaltung aufgegeben worden. Seither gilt als Leitsatz, daß sowohl der Abschluß als auch die Wirkungen des Vertrages grundsätzlich (Ausnahmen unten N 257) nach einem einzigen Recht zu beurteilen sind (N 223/25).

Dem Prinzip der Anwendung eines einzigen Rechts auf den ganzen Vertrag 253 widerspricht auch die sog. kleine Vertragsspaltung. Diese ergibt sich bei gegen-

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seitig verpflichtenden Verträgen dann, wenn (im Rahmen der großen Vertragsspaltung) zur Bestimmung des über die Vertragswirkungen entscheidenden Rechts vom Erfüllungsort der einzelnen Obligation oder vom Wohnsitz des Schuldners der einzelnen Leistung ausgegangen wird. So hat das Bundesgericht seit BGE 11 (1915) II 591 dort, wo die Parteien keine Rechtswahl getroffen haben, jede einzelne Verpflichtung bezüglich ihrer Wirkungen nach dem Recht des Erfüllungsortes der einzelnen Leistung beurteilt (N 226/28). Diese kleine Vertragsspaltung mißachtet die gegenseitige Abhängigkeit von Leistung und Gegenleistung in den sog. zweiseitigen Verträgen und ist daher seit langem mit Recht angefochten worden (N 229). Schließlich, wenn auch spät, hat das Bundesgericht die kleine Vertragsspaltung aufgegeben. Zu ihrer Überwindung hat es aber vorerst nicht zu einer der drei oben erwähnten Methoden (N 214/18, N 250) gegriffen, von denen die Vertragstypenformel inzwischen internationale Bedeutung erlangt hat (N 231/31). Es hat zunächst eine Zwischenformel gewählt, bestehend in dem Grundsatz, daß die Wirkungen des Vertrages sich beurteilen nach dem Recht desjenigen Landes, mit dem das Vertragsverhältnis den engsten räumlichen Zusammenhang aufweist, siehe N 235 und BGE 60 II 301, 61 II 182, 63 II 44, 385, 75 II 62/63. Dabei wurde zunächst angenommen, dem Erfüllungsort der für den Vertrag charakteristischen (d. h. der nicht in Geld bestehenden) Leistung komme unter den räumlichen Beziehungen die größte Bedeutung zu. Bewußt aufgegeben wurde die kleine Vertragsspaltung erst in BGE 78 II 77/79 (N 235), und zwar, wie beim gleichzeitigen Verzicht auf die große Vertragsspaltung, unter Benützung dieser Zwischenformel.

254 Diese Zwischenformel, die sich äußerlich als Generalformel (mit Ausweichklausel) präsentiert, in Wirklichkeit aber eine kasuistische Formel darstellt (N 216), ist in der jüngsten Rechtsprechung praktisch zur Vertragstypenformel weiterentwickelt worden (N 236/39). Dem Erfüllungsort der charakteristischen Leistung wird im Rahmen der Zwischenformel (vom «engsten räumlichen Zusammenhang») nicht mehr die überwiegende Bedeutung zugemessen, sondern es wird nun für jede einzelne Vertragsart in der Regel das Recht am Wohnort (Geschäftssitz) derjenigen Partei als maßgeblich erklärt, deren Leistung für den Vertrag charakteristisch ist, oder es wird auf einen andern besonders kennzeichnenden Umstand des Vertrages (Vertragsgegenstand, bestimmte Eigenschaft eines Vertragspartners, Ort des Abschlusses, Gleichförmigkeit bei sog. Massenverträgen, Charakter eines Gefälligkeitsgeschäftes usw.) abgestellt. So gilt beim Kauf das Recht am Wohnort des Verkäufers (BGE 77 II 81, 191, 78 II 78, 79 II 165/66, 297/98), beim Auftrag und Agenturvertrag das Recht am Mittelpunkt der Tätigkeit des Beauftragten (Art. 418 b Abs. 2, BGE 67 II 181, 217), bei gleichförmigen Massenverträgen (Formularverträgen) das Recht am Ort der gewerblichen Niederlassung der entsprechenden Unternehmen, so im Versicherungswesen (BGE 51 II 409, 71 II 289 f., 79 II 196) und bei Frachtverträgen (BGE 74 II 85), beim Darlehen das Recht am Wohnsitz des Darlehensgebers (BGE 78 II 191), bei einseitig verpflichtenden Verträgen der

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Wohnsitz des die Hauptverpflichtung tragenden Schuldners (bei einseitiger Schuldverpflichtung BGE 65 II 81. Wohnort des Bürgen 63 II 308. Wohnort des Garanten 76 II 36/37).

So ist also die neueste Rechtsprechung auf dem Umweg über die Zwischenformel in der Hauptsache praktisch doch zur Vertragstypenformel gelangt, deren Anwendung auf die einzelnen Vertragsarten unten in N 258—324 dargelegt wird. 255

Sowohl mit der Zwischenformel nach der bundesgerichtlichen Rechtsprechung wie mit der Vertragstypenformel ist die Ausweichklausel (N 240, N 242) zu verbinden. 256

c) Besondere Anknüpfung für gewisse Sonderfragen bei Verträgen. 257 Der Grundsatz, wonach ein Vertrag auch im IPR als Ganzes einem einzigen Recht zu unterstellen ist, wird nach heutiger Rechtsprechung des Bundesgerichts gewahrt sowohl im Falle der Bestimmung des maßgeblichen Rechtes durch Rechtswahl der Parteien (N 243/49) als auch im Falle der Bezeichnung des maßgeblichen Rechtes durch objektive Anknüpfung (N 250/56). Trotzdem werden einzelne Sonderfragen nach wie vor abgetrennt, gesondert angeknüpft und infolgedessen nach besonderem Recht beurteilt, so (gemäß BGE 78 II 86/87) die Handlungsfähigkeit (N 138 ff.) und die Form der Verträge (N 169/70), ferner Vollmacht und Stellvertretung (N 155), ebenso das Mängelrügeverfahren (Angaben oben N 101).

IX. Vertragsobligationen: 4. Einzelne Vertragsarten

1. Ausgangspunkt

Im vorhergehenden Abschnitt VIII (N 191—257) sind die allgemeinen Grundsätze für die Beurteilung von Schuldverträgen nach schweizerischem IPR anhand der Rechtsprechung des Bundesgerichtes dargelegt. Darnach ist in erster Linie dasjenige Recht anwendbar, das die Parteien als maßgebendes Recht vereinbart haben (Grundsatz der *Rechtswahl durch die Parteien*, subjektive Anknüpfung des maßgeblichen Rechtes, siehe N 195--212. Zusammenfassung in N 243/49). Beim Fehlen einer Rechtswahl durch die Parteien bestimmt sich das für Schuldverträge maßgebliche Recht auf Grund *objektiver Anknüpfung*, und zwar für den ganzen Vertrag einheitlich, sowohl für die Fragen der Entstehung als auch für die Wirkungen des Vertrages (Ausnahmen N 225, N 257). Diese objektive Anknüpfung erfolgte in der neueren Rechtsprechung zunächst weder nach der sog. Generalformel (N 215), noch nach der kasuistischen Methode (N 216), noch nach der Vertragstypenformel (N 217/18, 231/34), sondern nach einer Zwischenformel, bestehend in dem Grundsatz, daß sich ein Vertragsverhältnis nach dem Rechte desjenigen Landes beurteilt, mit welchem das Vertragsverhältnis den engsten räumlichen Zusammenhang aufweist (N 235). Indessen hat sich diese Zwischenformel bei ihrer Handhabung in der jüngsten Rechtsprechung zur *Vertragstypenformel* entwickelt 258

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EXHIBIT 4--SCHOENENBERGER/JAGGI, GENERAL INTRODUCTION
ANN. 375-378, P. 138-139 ANNEXED TO
AFFIDAVIT OF WERNER DE CAPITANI

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rungsgesellschaft Erw. 3 (veröffentlicht in BlZüR 1912 Nr. 100 S. 311 f.); BGE 18. 11. 1960 i. S. Alfil AG gegen Hausmann, Erw. 1 (n. p.). Über den gesetzlichen Forderungsübergang auf einen zahlenden Solidarschuldner siehe unten N 381/83.

2. Bedingungen

373 Ihre kollisionsrechtliche Behandlung wirft keine besondern Fragen auf. Bedingungen sind stets Vertragsklauseln, unterstehen daher dem Statut des Vertrages, in dem sie vorkommen.

3. Konventionalstrafen

374 Gewöhnlich ist die Vereinbarung einer Konventionalstrafe (Vertragsstrafe) Gegenstand einer besondern Klausel im Rahmen eines (Haupt-)Vertrages. Wird sie ausnahmsweise erst nachträglich vereinbart, so erscheint diese Abrede als bloßer Zusatz zu diesem Vertrag. In beiden Fällen stellt sie nichts anderes als eine Vertragsklausel dar, die zudem der Verstärkung oder Sicherung der Hauptverpflichtung dient. Folglich ist sie nach dem gleichen Rechte zu beurteilen wie diese, zustimmend BGE 82 II 552.

Über die Herabsetzung der Konventionalstrafe unter dem Gesichtspunkt der Vorbehaltsklausel siehe oben N 126.

XIV. Übergang von Forderungen und Schulden

375 **Sonderliteratur:** Briner, Die Schuldübernahme im schweizerischen IPR. Diss Zürich, o. J. [1947]; Guldener, Zession, Legalzession und Subrogation im IPR, Diss. Zürich, o. J. [1959]; Zweigert, Das Statut der Vertragsübernahme (RabelsZ 1958 S. 643 f.).

1. Abtretung (Zession)

376 **a) Abtretbarkeit.** Ob eine Forderung abtretbar ist oder ob dies von Gesetzes wegen bzw. kraft vertraglicher Abrede ausgeschlossen ist, kann sich nur nach dem Rechte beantworten, dem die Forderung untersteht, also nach dem Schuldstatut (oben N 355). Dies ist ständige Rechtsprechung, BGE 61 II 245 mit Hinweis auf frühere Urteile, 62 II 110, 74 II 86 f., 78 II 392.

377 **b) Materielle und formelle Voraussetzungen der Abtretung.** Über die *materiellen* Voraussetzungen der Abtretung (Zuwendungsgeschäft) entscheidet ebenfalls das für die abzutretende Forderung maßgebliche Schuldstatut, also z. B. darüber, ob die Forderungsabtretung zu ihrer Wirksamkeit einer Mitteilung an den Schuldner bedarf, ob die Abtretung abstrakt oder kausal ist, d. h. ob ein gültiges Rechtsgeschäft (Kauf, Schenkung, Sicherung usw.) zwischen dem Abtretenden und dem Erwerber (Neugläubiger) vorausgesetzt wird und von wem dies allenfalls nachgewiesen werden muß. Das Grundgeschäft (Kausalgeschäft, Veranlassungsgeschäft) dagegen, das den Rechtsgrund für die Abtretung ergibt (und manchmal zu-

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sätzlich auch noch den Abtretungsvertrag enthält), untersteht natürlich seinem eigenen Recht. Ebenso BGE 61 II 215, 62 II 110, 74 II 87, 78 II 392.

Hinsichtlich der *formellen* Voraussetzungen der Abtretung ist das über die abzutretende Forderung gebietende Schuldstatut anwendbar, jedoch ergänzt durch die fakultative Regel über die Form der Rechtsgeschäfte (oben N 168—190), derzufolge auch die Beobachtung der Form nach dem Rechte jenes Ortes genügt, an dem die Abtretungserklärung des abtretenden Gläubigers abgegeben wurde, BGE 18 S. 522, 61 II 215, 63 II 37, 65 II 83, 74 II 87, 78 II 392 (gegen Anwendbarkeit der Regel locus regit actum GULDENER 34 f.; für das Recht am Schuldnerwohnsitz ZWEIGERT in RabelsZ 1958 S. 653). Der Kollisionsnorm über die Form untersteht auch die Art und Weise der Anzeige der Forderungsabtretung an den Schuldner; die Frage, ob die Anzeige Gültigkeitsvoraussetzung der Abtretung ist, entscheidet sich dagegen nach dem Schuldstatut, oben N 182, GULDENER 35 f. 378

c) Das Verhältnis zwischen Schuldner und Neugläubiger (Erwerber), somit die Wirkung der Abtretung, beurteilt sich nach dem Rechte, das schon bisher die Verpflichtung des Schuldners geregelt hat, also nach dem Schuldstatut; denn nur dieses kann sagen, wem der Schuldner leisten muß oder darf. Damit ist zugleich einem allgemein anerkannten Leitsatz des IPR Genüge getan, dahingehend, daß eine Abtretung die Rechtslage des Schuldners nicht verschlechtern darf. Das Schuldstatut beantwortet die Frage, von wann an der Schuldner mit befreiender Wirkung nur noch an den Forderungserwerber leisten kann; desgleichen die Frage nach der Zulässigkeit jener Einreden, welche gegenüber dem Altgläubiger erhoben werden konnten, zustimmend BGE 65 II 83 f. Die Änderung des Erfüllungsortes infolge Forderungsabtretung bewirkt keine Änderung des Schuldstatuts, BGE 59 II 400. 379

d) Das Verhältnis zwischen Alt- und Neugläubiger richtet sich nach dem der Abtretung vorausgehenden Grundgeschäft (Kausalgeschäft), z. B. Kauf, Schenkung, Garantievertrag, Erfüllung einer Verpflichtung (Abtretung zahlungshalber, an Zahlungsstatt). Dieses ist als selbständiges Rechtsgeschäft dem dafür zuständigen Schuldstatut unterworfen, BGE 18 S. 522. Es regelt namentlich auch die Gewährleistung des Abtretenden für den Bestand der Forderung und für die Zahlungsfähigkeit des Schuldners, desgleichen die Folgen einer dem Schuldner gegenüber allenfalls unwirksamen Abtretung. 380

2. Gesetzlicher Forderungsübergang

Unter gesetzlichem Forderungsübergang (cessio legis, Legalzession, Subrogation) versteht man jene Fälle des Gläubigerwechsels bei einer Einzelforderung (Singularsukzession), die nicht auf Rechtsgeschäft (Abtretung) beruhen, sondern kraft Gesetzes auf Grund anderer Tatsachen eintreten. Als «andere Tatsache» kommt häufig die Erfüllung einer Schuld oder eine andere Art der Befriedigung der Interessen des Gläubigers in Betracht; auch etwa das Vorliegen eines Verfügungs- 381

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EXHIBIT 5--SWISS CODE OF OBLIGATIONS (CO), ARTICLES 164-174 ANNEXED TO AFFIDAVIT OF WERNER DE CAPITANI

15

FIFTH TITLE

The assignment of choses in action and the assumption of obligations

TITULO QUINTO

De la cesión de créditos y de la sustitución del deudor

TITRE CINQUIÈME

De la cession des créances et de la reprise de dette

---

164. [162.]

A creditor can assign his claim to another person without the debtor's assent, unless the assignment is forbidden by law, agreement or the nature of the legal transaction.

Where a third person has become creditor on the faith of a written acknowledgment of debt which does not mention that the claim is unassignable, the debtor cannot set up the defence against such third person that the unassignability was agreed on.

A. Assignment of claims.
I. Requirements.
1. Voluntary assignment.
a) When possible.

El acreedor puede ceder su derecho a un tercero sin consentimiento del deudor, excepto en los casos en que la cesión esté prohibida por la ley, la convención o la naturaleza del asunto.

Al tercero que adquirió un crédito bajo la fe de un reconocimiento escrito de deuda en que no se contenía la prohibición de cederlo, no puede oponer el deudor la disculpa de que la cesión estaba excluida por convenio entre las partes.

A. Cesión de créditos.
I. Condiciones.
1. Cesión voluntaria.
a. Admisibilidad.

Le créancier peut céder son droit à un tiers sans le consentement du débiteur, à moins que la cession n'en soit interdite par la loi, la convention ou la nature de l'affaire.

Le débiteur ne peut exciper de ce que la créance avait été stipulée incessible, si le tiers est devenu créancier sur la foi d'une reconnaissance écrite ne mentionnant pas l'incessibilité.

A. Cession des créances.
I. Conditions.
1. Cession volontaire.
a. Admissibilité.

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165. [163.]

b) Form of contract.

In order to be valid the assignment must be in writing.

A promise to make an assignment need not be in writing.

b. Forma del contrato.

No es válida la cesión más que cuando se halle acreditada por escrito.

Para la promesa de ceder un crédito no se requiere forma alguna particular.

b. Forme du contrat.

La cession n'est valable que si elle a été constatée par écrit.

Aucune forme particulière n'est requise pour la promesse de céder une créance.

166. [164.]

2. Transfer by law or judgment.

Where the transfer of choses in action is effected by operation of law or by judgment, the transfer is effective as against third persons, independant of any formality or assent of the former creditor.

2. Cesión legal o judicial.

Cuando la cesión se opere en virtud de la ley o de un juicio, puede oponerse contra los terceros sin formalidad alguna y aun independientemente de toda manifestación de su voluntad por parte del acreedor precedente.

2. Cession légale ou judiciaire.

Lorsque la cession s'opère en vertu de la loi ou d'un jugement, elle est opposable aux tiers sans aucune formalité et même indépendamment de toute manifestation de volonté de la part du précédent créancier.

167. [165.]

II. Effect of assignment.
1. Position of debtor.
a) *Bona fide* payment.

The debtor is validly discharged if, before the assignor or assignee notified him of the assignment, he paid to his former creditor or, in the case of successive assignments, to one of the assignees against whom others have a better right.

II. Efectos de la cesión.
1. Situación del deudor liberado.
a. Pago de buena fe.

El deudor queda válidamente liberado si, antes de que la cesión se haya puesto en su conocimiento por el cedente o el cesionario, paga de buena fe al acreedor

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anterior, o, en caso de cesiones múltiples, al cesionario sobre el cual otra persona tenga un derecho preferente.

Le débiteur est valablement libéré si, avant que la cession ait été portée à sa connaissance par le cédant ou le cessionnaire, il paie de bonne foi entre les mains du précédent créancier ou dans le cas de cessions multiples, entre les mains d'un cessionnaire auquel un autre a le droit d'être préféré.

II. Effets de la
sion.
1. Situation d
débiteur céd
a. Paiement o
ré de bonne

168. [166.]

Where the ownership of choses in action is disputed, the debtor may refuse payment and obtain his discharge by lodging the amount with the court.

b) Refusal of p
ment and lo
ment.

The debtor pays at his own peril, if he knows of the dispute.

Where the case is pending in court and the debt is due, each party can compel the debtor to effect payment into court of the sum due.

El deudor de un crédito cuya propiedad se encuentre en litigio puede rehusar el pago, y liberarse por la consignación de su importe en el Tribunal.

b. Denegación
pago y consi
ción.

Paga por su cuenta y riesgo si lo hace teniendo conocimiento del litigio.

En caso de pleito pendiente, si hubiese vencido el crédito, cada una de las partes puede obligar al deudor a consignar la suma debida.

Le débiteur d'une créance dont la propriété est litigieuse peut en refuser le paiement et se libérer par la consignation du montant en justice.

b. Refus de pa
ment et con
gnation.

Il paie à ses risques et périls, s'il le fait en ayant connaissance du litige.

S'il y a procès pendant et que la créance soit exigible, chacune des parties peut contraindre le débiteur à consigner la somme due.

169. [167.]

The debtor is entitled as against the assignee to the benefit of any defences which he had against the assig-

c) Defences of
debtor.

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nor's claim, provided they existed at the time when the debtor was notified of the assignment.

The debtor is entitled to set off his counterclaim, even if it was not yet due at such time, provided said counterclaim has not matured at a later date than did the assigned claim.

c. Excepciones del deudor.

El deudor puede oponer contra el cesionario, como hubiera podido oponer contra el cedente, las excepciones que le correspondieran en el momento en que tuvo conocimiento de la cesión.

Si posee contra el cedente un crédito no exigible aún en aquella época, puede invocar la compensación siempre que dicho crédito no haya vencido con posterioridad al crédito objeto de la cesión.

c. Exceptions du débiteur cédé.

Le débiteur peut opposer au cessionnaire, comme il aurait pu les opposer au cédant, les exceptions qui lui appartenaient au moment où il a eu connaissance de la cession.

S'il possédait contre le cédant une créance non encore exigible à cette époque, il peut invoquer la compensation, pourvu que sa créance ne soit pas devenue exigible postérieurement à la créance cédée.

170. [168.]

2. Transfer of accessory rights, documents and means of proof.

The assignment of a claim includes the transfer of the privileges and accessory rights, except those which cannot be separated from the assignor's person.

The assignor has to deliver to the assignee the document evidencing the debt and all existing means of proof and must furnish him with all information necessary to bring forward the claim.

Interest in arrear is presumed to be transferred together with the principal debt.

2. Transferencia de los derechos accesorios. Título y medios de prueba.

La cesión de un crédito comprende la de los derechos preferentes y la de todos los derechos accesorios, salvo aquellos que sean inseparables de la persona del cedente.

Este se halla obligado a entregar al cesionario el título del crédito y a suministrarle los medios de prueba

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de que disponga, así como los informes necesarios para hacer valer sus derechos.

Los intereses atrasados presúmese haber sido cedidos con el crédito principal.

2. Transfert d
droits acces
soires, titre
moyens de
preuve.

La cession d'une créance comprend les droits de préférence et autres droits accessoires, sauf ceux qui sont inséparables de la personne du cédant.

Le cédant est tenu de remettre au cessionnaire le titre de créance et de lui fournir les moyens de preuve existants, ainsi que les renseignements nécessaires pour faire valoir ses droits.

Les intérêts arriérés sont présumés avoir été cédés avec la créance principale.

171. [169.]

3. Warranty.
a) In general.

In the case of assignments for valuable consideration the assignor impliedly warrants the existence of the claim at the time when the assignment is made.

But, unless otherwise agreed, the assignor is presumed not to warrant the solvency of the debtor.

In the case of gratuitous agreements the assignor is not even liable for the existence of the claim.

3. Garantia.
a. En general.

Si la cesión se hace a título oneroso, el cedente garantiza la existencia del crédito en el momento de la transferencia.

No responde de la solvencia del deudor más que cuando se hubiera comprometido a ello.

Cuando la cesión se realiza a título gratuito, el cedente no responde de la existencia del crédito.

3. Garantie.
a. En général.

Si la cession a lieu à titre onéreux, le cédant est garant de l'existence de la créance au moment du transfert.

Il ne répond de la solvabilité du débiteur que lorsqu'il s'y est engagé.

Si la cession a lieu à titre gratuit, le cédant n'est pas même garant de l'existence de la créance.

172. [170.]

b) Assignment
lieu of payn

Where a creditor has assigned his claim in order to pay off a debt, but without mentioning the amount at

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which it shall be credited, the assignee is only charged with the amount which he receives from the debtor or which he could have received by the exercise of necessary care.

b. Cesión a titulo de dación en pago.

Cuando la cesión se hace a titulo de pago, pero sin indicación de la suma que deba descontarse, el cesionario no está obligado a imputar a su crédito más que lo que haya recibido efectivamente del deudor, o lo que hubiera podido recibir de él practicando las diligencias necesarias.

b. Cession à titre de dation en paiement.

Lorsqu'une cession a eu lieu à titre de paiement, mais sans indication de la somme à décompter, le cessionnaire n'est tenu d'imputer sur sa créance que ce qu'il reçoit effectivement du débiteur, ou ce qu'il aurait pu recevoir de lui en faisant les diligences nécessaires.

173. [171.]

c) Extent of liability.

The assignor under the warranty is only liable for the consideration received plus interest, furthermore for the costs of the assignment and of the unsuccessful proceedings against the debtor.

Where a claim is transferred to another person by operation of law, the original creditor is liable neither for the existence of the claim nor for the solvency of the debtor.

c. Extensión de la garantía.

El cedente obligado a garantizar no lo está para con el cesionario más que hasta el importe de la suma que haya recibido como principal y sus intereses: debe también los gastos de la cesión y cuantos hayan originado las diligencias judicioles infructuosas contra el deudor.

Cuando la cesión tiene lugar en virtud de la ley, el acreedor precedente no es garante ni de la existencia del crédito ni de la solvencia del deudor.

c. Etendue de la garantie.

Le cédant obligé à garantie n'est tenu envers le cessionnaire que jusqu'à concurrence de la somme qu'il a reçue, en principal et intérêts; il doit, en outre, les frais de la cession et ceux des poursuites infructueuses contre le débiteur.

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Lorsque la cession a lieu en vertu de la loi, le précédent créancier n'est garant ni de l'existence de la créance, ni de la solvabilité du débiteur.

174. [172.]

Any special provisions governing the assignment of choses in action are not affected hereby.

III. Special pro
sions.

Resérvanse las reglas especiales a que la ley somete la cesión de ciertos derechos.

III. Reglas espe
les que se re-
van.

Sont réservées les règles spéciales auxquelles la loi soumet la cession de certains droits.

III. Règles spéc
les réservées.

175. [173.]

B. Assumption
obligations.
I. Debtor and
suming party

A person who promises to a debtor to assume his debt is bound to discharge him therefrom either by satisfying the creditor or by substituting himself for the former debtor with the creditor's consent.

The debtor cannot compel the assuming party to carry out this obligation as long as he fails himself to perform the obligations imposed on him by the assumption agreement.

The original debtor can, where the assuming party fails to discharge him, demand security from such party.

B. Sustitución d
deudor.
I. Antiguo y nu
deudor.

La promesa hecha a un deudor de responder de su deuda obliga al que se compromete a ello a liberar a aquél, bien pagando al acreedor, bien cargando sobre sí la deuda con el consentimiento de éste.

El que echa sobre sí la deuda no puede ser obligado por el deudor a que ejecute su compromiso hasta tanto que este último no haya cumplido con él sus obligaciones derivadas del contrato de transferencia de deuda.

El antiguo deudor que no haya sido liberado puede exigir seguridades al nuevo.

B. Reprise de
dette
I. Débiteur et
prenant.

La promesse faite à un débiteur de reprendre sa dette oblige le reprenant à le libérer soit en payant le créancier, soit en se chargeant de la dette du consentement de celui-ci.

EXHIBIT 6--SWISS CODE OF OBLIGATIONS (CO), ARTICLES 12-15 ANNEXED TO AFFIDAVIT OF WERNER DE CAPITANI

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III. Tiempo al cual se remontan los efectos de un contrato entre ausentes.

El contrato concluido entre ausentes produce sus efectos desde el momento en que se expide la aceptación. Si no se necesita una aceptación expresa, los efectos del contrato arrancan del momento del recibo de la oferta.

III. Temps auquel remontent les effets d'un contrat entre absents.

Le contrat conclu entre absents déploie ses effets dès le moment où l'acceptation a été expédiée.

Si une acceptation expresse n'est pas nécessaire, les effets du contrat remontent au moment de la réception de l'offre.

11.

B. Form of contracts.
I. Requirements and bearing in general.

Contracts are valid without any special form unless the law provides otherwise.

In the absence of a contrary provision concerning the bearing and effect of a legally prescribed form, its observance is a condition of the validity of the contract.

B. Forma de los contratos.
I. Regla general y alcance de la forma escrita.

La validez de los contratos no puede subordinarse a la observancia de cualquier forma particular más que en virtud de una prescripción especial de la ley.

A falta de disposición contraria sobre el alcance y los efectos de la forma prescrita, el contrato no es válido sino cuando se haya observado dicha forma.

B. Forme des contrats.
I. Règle générale et portée des formes prescrites.

La validité des contrats n'est subordonnée à l'observation d'une forme particulière qu'en vertu d'une prescription spéciale de la loi.

A défaut d'une disposition contraire sur la portée et les effets de la forme prescrite, le contrat n'est valable que si cette forme a été observée.

12.

II. Written form.
1. Prescribed by law.
a) Bearing.

Where a contract must by law be in writing, every alteration thereof must also be in writing, except supplementary non-essential provisions which do not contradict the instrument.

II. Forma escrita.
1. Forma requerida por la Ley.
a. Su alcance.

Cuando la ley exija que un contrato se redacte por escrito, dicha regla se aplica también a todas las modificaciones del contrato, fuera de las estipulaciones complementarias y accesorias que no se hallen en contradicción con el acto.

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II. Forme écrite.
1. Forme requise par la loi.
a. Sa portée.

Lorsque la loi exige qu'un contrat soit fait en la forme écrite, cette règle s'applique également à toutes les modifications du contrat, hormis les stipulations complémentaires et accessoires qui ne sont pas en contradiction avec l'acte.

13.

b) Requirements.

A contract which must by law be in writing must bear the signatures of all persons whom it is intended to bind.

In the absence of legal provisions to the contrary, letters and telegrams are considered as being in writing, provided they bear the signature of the persons who enter into obligations.

b. Sus elementos.

El contrato para el cual la ley exija la forma escrita deberá hallarse firmado por todas las personas a las cuales imponga alguna obligación.

Cuando la ley no dispone otra cosa, toda carta o telegrama equivale a la forma escrita, siempre que la carta o el original del telegrama contenga la firma de las partes que se obligan.

b. Ses éléments.

Le contrat pour lequel la loi exige la forme écrite doit être signé par toutes les personnes auxquelles il impose des obligations.

Si la loi n'en dispose autrement une lettre ou un télégramme équivaut à la forme écrite, pourvu que la lettre ou l'original du télégramme porte la signature des parties qui s'obligent.

14.

c) Signature.

The signature must be written personally.

Mechanically produced facsimiles of an autographic signature are only deemed sufficient where their use is customary, especially in the case of the signature of securities to be issued in large numbers.

The signature of a blind person is only binding upon him if it is authenticated, or if there is proof that he knew the contents of the instrument when signing it.

c. Firma.

La firma debe hallarse escrita de la propia mano del que se obliga.

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La que proceda de algún medio mecánico no se tendrá por suficiente más que en los negocios en que el uso la admita, en especial cuando se trata de firmar titulos de valor expedidos en número considerable.

La firma de los ciegos no les obliga sino cuando se legaliza debidamente, o si se demuestra que conocían el texto del contrato en el momento de firmarlo.

c. Signature.

La signature doit être écrite à la main par celui qui s'oblige.

Celle qui procède de quelque moyen mécanique n'est tenue pour suffisante que dans les affaires où elle est admise par l'usage, notamment lorsqu'il s'agit de signer des papiers-valeurs émis en nombre considérable.

La signature des aveugles ne les oblige que si elle a été dûment légalisée, ou s'il est établi qu'ils ont connu le texte de l'acte au moment de signer.

15.

d) Substitutes for signature.

Subject to the legal provisions relating to bills of exchange, a person who is unable to sign is authorized to substitute for the signature an attested mark or a public authentication.

d. Señales en sus-
tución de la fi-
ma.

Se permite a toda persona que no pueda firmar sustituír su firma por una señal hecha a mano, debidamente legalizada, o por un destimonio auténtico; resérvanse las disposiciones concernientes a la letra de cambio.

d. Marques pou-
vant remplace
la signature.

Il est permis à toute personne qui ne peut signer de remplacer sa signature par une marque à la main, dûment légalisée, ou par une attestation authentique; sont réservées les dispositions concernant la lettre de change.

16.

2. Form stipulate by agreement.

Where the parties to a contract for which the law requires no special form have stipulated to use a special form, <there is a presumption that they shall not be bound> [they shall not be bound by the contract] until the special form is complied with.

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EXHIBIT 7--SCHOENENBERGER/JAGGI, GENERAL INTRODUCTION
ANN. 70-72 AD ART. 13 CO, P. 568-569 ANNEXED
TO AFFIDAVIT OF WERNER DE CAPITANI

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jede dieser Urkunden braucht von allen Partnern unterzeichnet zu werden; wohl aber hat *jeder Partner eine Urkunde zu unterzeichnen*. Sodann muß ein *Austausch* der Urkunden stattfinden (BGE 50 II 282 ff.): Jede Urkunde muß vom Unterzeichner in Erklärungsabsicht (N 49 f.) dem (oder den) andern Partner(n) abgesendet werden und diesem (oder diesen) zugehen. Der Austausch als solcher braucht nicht verurkundet zu werden.

Sein *Beweis* ist mit irgendwelchen Mitteln möglich. Der Besitz eines vom Vertragsgegner unterzeichneten Exemplars belegt zunächst dessen Zugang (und damit den Erklärungswillen des Unterzeichners). Zugleich bildet er ein Indiz, nicht aber den vollen Beweis, für den Austausch (also auch für die Absendung eines Gegenexemplars).

Ungenügend ist natürlich die bloße Entgegennahme einer vom Vertragsgegner unterzeichneten Urkunde, ohne Verurkundung der eigenen Zustimmung (BGE 92 II 103).

68 — Die mehreren Urkunden brauchen nicht gleich zu lauten, sondern können, wie bei Briefen üblich, *verschieden gefaßt* sein, als *je eigene Erklärung* des Absenders. Wohl aber muß jeder Brief den gesamten formbedürftigen Inhalt des Vertrages (N 14) verurkunden, also auch den Inhalt der (abzugebenden oder schon abgegebenen) Gegenerklärung zum Inhalt der eigenen Erklärung erheben; und die in jedem Brief umschriebenen Vertragsinhalte müssen, wie allgemein bei Antrag und Annahme (N 66), miteinander übereinstimmen (N 48 zu Art. 3). Diesen Erfordernissen genügt der zweite Brief, die Annahme, schon dadurch, daß er auf den Inhalt des Antrages verweist (N 149 ff. zu Art. 1) und außerdem die Zustimmung des Annehmenden festhält (N 54 zu Art. 3).

69 b) Erst recht zulässig, weil von der Grundform (N 64) weniger stark abweichend, ist der vom Gesetz nicht erwähnte **Austausch von Vertragsdoppeln** unter Anwesenden oder Abwesenden. Er unterscheidet sich vom Briefwechsel dadurch, daß die ausgetauschten Urkunden nicht selbständig gefaßt sind (als Erklärung je eines Absenders, N 63), sondern gleich lauten und somit zu einer gemeinsamen Erklärung dienen (N 168 zu Art. 1). Es genügt, wenn jede Partei nur ein Doppel unterzeichnet (DBGB § 126 Abs. 2 Satz 2) und wenn dieses dem Partner zugeht oder ausgehändigt wird (siehe aber N 74). Der Austausch ist ebenso unerläßlich wie bei Briefen (BGE 17. 301; 20. 136; 50 II 282 ff.).

70 c) **Der Telegrammwechsel** kommt bei formbedürftigen Verträgen kaum jemals vor. Abs. 2 erwähnt ihn nur deshalb, weil das Vorbild des Gesetzgebers auch die vertraglich vorgesehene Schriftform einbezog (N 58). Für solche Fälle kann Abs. 2, trotz seiner Beschränkung auf die gesetzlich vorgeschriebene Form (N 3), analog angewendet werden (Art. 16 Abs. 2).

71 **Beim Wechsel von Telegrammen werden nicht Urkunden befördert, sondern in Urkunden faßbare Sinngehalte. Jeder Empfänger erhält eine vom Telegraphendienst erstellte Urkunde, die nicht die Unterschrift des Absenders trägt. Jeder Absender fertigt nur ein Originaltelegramm aus, das in Abs. 2 als «*Aufgabedepesche*» bezeichnet wird. Falls er dieses Schriftstück (eigen-**

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händig) unterschreibt (was telegraphenrechtlich nicht erforderlich ist), so ist gemäß Abs. 2 die Schriftform erfüllt; dies obwohl der Empfänger die Unterschrift nicht zu Gesicht bekommt. Das Originaltelegramm wird von der Aufgabestelle wenigstens während 12 Monaten aufbewahrt. Während dieser Frist können Absender und Empfänger davon Einsicht nehmen und beglaubigte Unterschriften verlangen, was dem Absender gestattet, die Erfüllung der Form zu beweisen, und dem Empfänger erlaubt, diese nachzuprüfen. Der Absender kann in das Originaltelegramm eine amtliche Beglaubigung seiner Unterschrift aufnehmen und diese befördern lassen; das ist jedoch zur Erfüllung der Form nicht notwendig (vgl. zum Ganzen: Telegraphen- und Telephonverkehrsgesetz von 1922, Art. 15; Telegraphen-VO von 1939/69, Art. 13 und 40; AS 1969, 671).

Im *Telexverkehr* gibt es keine (der Unterzeichnung fähige) Aufgabedepesche (N 71), so daß die Erfüllung der Schriftform unmöglich ist. 72

d) Der Vorbehalt anderer Bestimmungen. Auf Verträge, die als Ausweis für eine Eintragung in das Schiffsregister oder in das Luftfahrzeugbuch dienen, ist Abs. 2 nicht anwendbar (BG über das Schiffsregister, Art. 32 und 41; BG über das Luftfahrzeugbuch, Art. 7). Vgl. auch N 84. 73

Außerdem setzt *Art. 226c* den Erhalt eines «beidseitig unterzeichneten Vertragsdoppels» voraus. Das kann aber — da der einschlägige Art. 226a für die «schriftliche Form» kein Doppel fordert — nur folgendes bedeuten: Die *Frist* des Art. 226c beginnt erst dann zu laufen, wenn eine Ausfertigung des Vertrages («Doppel»), die der Käufer vom Verkäufer erhält, nicht nur von diesem unterzeichnet wurde, sondern auch vom Käufer (und zwar offenbar schon vorher, als Antrag des Käufers). Für den formgültigen Abschluß des Vertrages (unter Vorbehalt des Rechtes des Käufers, auf den Vertragsabschluß zu verzichten), insbesondere für die Bindung des Verkäufers, genügt schon der Austausch auch nur einseitig unterzeichneter Doppel (N 69; a. M.: STOFFER, Kommentar zum BG über den Abzahlungs- und Vorauszahlungsvertrag, Basel 1963, 62). 74

Denkbar sind ferner (vom Gesetz nicht ausdrücklich vorbehaltene) Formvorschriften, die in Abweichung von Abs. 1 die Unterzeichnung mehrerer Vertragsurkunden durch alle Partner verlangen. Solche Bestimmungen gibt es aber nicht. Die Vorschrift, daß jede Partei des Heuervertrages Anspruch auf eine Ausfertigung des Vertrages hat (Seeschiffahrtsgesetz, Art. 69), ist nicht eine Gültigkeits-, sondern eine Verurkundungsvorschrift (N 107 zu Art. 11). 75

II. Die in Art. 13 nicht geregelten Fälle der Schriftform

1. Beim einseitigen Schuldvertrag (N 118 zu Art. 1) stellt sich zuerst die Frage nach dem 76

a) Umfang des Formzwanges: Unterliegt einzig die Verpflichtungserklärung der Form oder der ganze Vertrag, also auch die (in der Zustimmung sich erschöpfende) Gegenerklärung? Diese Frage wird *nicht durch Art. 13 beantwortet*, sondern durch die betreffenden Formvorschriften, welche durchwegs *einzig die Verpflichtungserklärung* der Schriftform unterwerfen. Formbedürftig sind: nur die «Bürgschaft» (Art. 493) und das «Schenkungsversprechen» (Art. 243), nicht der gesamte Bürgschafts- oder Schenkungsvertrag; die Verpflichtung zur Konkurrenzenthaltung (Art. 340), die Aktienzeichnung (Art. 632), die Erklärung des Beitritts in eine Genossenschaft (Art. 840), nicht auch die Zustimmung des Arbeitgebers, die Annahme der Zeichnung (SIEGWART N 18 zu Art. 632) oder die allenfalls notwendige Aufnahmeerklärung der Genossenschaft. 77

AFFIDAVIT OF GERALD E. ROSS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN B. MILLER, as Trustee in
Bankruptcy of AMERICAN IBC CORP.,

Plaintiff,

-against-

WELLS FARGO BANK INTERNATIONAL CORP.,

Defendant.

74 Civ. 3714
(M. P. P.)

AFFIDAVIT

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

GERALD E. ROSS, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and am associated with the firm of Dunnington, Bartholow and Miller, attorneys for defendant, Wells Fargo Bank International in the above-captioned action. I am familiar with the facts and circumstances of this matter. I make this affidavit as part of defendant's response to the inquiry of this Court respecting the applicability of Swiss Law to the rights of Swiss Credit Bank in the proceeds of a foreign exchange contract entered into by Plaintiff and by Swiss Credit Bank, which matured on November 19, 1975 and is in issue in this action ("the second forward foreign exchange contract").

2. This case was tried before Honorable Milton P. Pollack on May 21 and May 22, 1975. Post-trial briefs and reply briefs were submitted by both parties on July 8, 1975 and September 17, 1975. On November 17, 1975 Judge Pollack's law clerk

called Charles L. Stewart, Esq., the member of this firm who is in charge of this matter, and relayed the following questions which the Court wished to have answered by each party:

> (A) Would a Swiss court apply Swiss law to determine if a third party could obtain an interest superior to that of Swiss Credit Bank in the dollar proceeds of the second forward foreign exchange contract after August 29, 1973?
>
> (B) Under Swiss law, could a third party have obtained an interest in the dollar proceeds of the second forward foreign exchange contract superior to that of Swiss Credit Bank after August 29, 1973?

3. Upon receipt of these questions I communicated with Dr. Beat Kleiner, an attorney in Zurich who is an expert on Swiss banking law. I arranged to meet with him later in the week to obtain his opinion regarding the questions posed by the Court. Dr. Kleiner is the general counsel of Swiss Union Bank, one of the three largest banks in Switzerland. He is also on the faculty of the University of Saint Gallen, in Switzerland, where he lectures on banking law. He has written extensively on banking questions. He has published a learned dissertation on security agreements, guaranties and related questions concerning Swiss banks' rights in property of their debtors. Dr. Kleiner was introduced to us and recommended very highly as an expert on the questions posed by the Court in this matter.

4. I met with Dr. Kleiner at his office in Zurich on Friday, November 21, 1975 and consulted with him about the above questions. He gave me his oral advice and agreed to draft a

written opinion which was subsequently delivered to us and is attached to this affidavit.

5. Dr. Kleiner's unequivocal conclusion, as is set forth in detail in the attached opinion, is that Swiss law does apply to the questions posed by the Court and that under Swiss law no third party could have achieved a right superior to that of Swiss Credit Bank in the proceeds of the second forward foreign exchange contract so long as and to the extent that AIBC was indebted to it.

6. We had previously consulted with Professor Kleiner with respect to other questions which could have arisen in this case. In connection with that consultation he had been supplied with a set of documents relating to the second loan transaction and also with a short memorandum summarizing those documents. Dr. Kleiner has attached the memorandum and the documents to his opinion. Since that consultation took place prior to the trial of the case the documents did not bear trial exhibit numbers. However, all the documents referred to by Dr. Kleiner, with four exceptions, were admitted into evidence at the trial of this matter as follows:

Documents Attached to Dr. Kleiner's Opinion	Trial Exhibit Designation
(1) May 15, 1973 -- Letter from Silverston (American IBC) to Wells Fargo, with four enclosures.	Plaintiff's Exhibit No. 9

(2) May 15, 1973 -- Swiss Credit Bank form confirming sale of dollars in exchange for Swiss francs on November 19, 1973, the dollar proceeds to be sent to Wells Fargo.	See, Plaintiff's Exhibit No. 52 (Paragraph 31) and Exhibit No. 9
(3) May 15, 1973 -- Swiss Credit Bank form confirming spot sale of Swiss francs for dollars to be deposited at United California Bank.	See, Plaintiff's Exhibit No. 52 (Paragraph 34) and Exhibit No. 9
(4) May 16, 1973 -- United California Bank confirmation form confirming that it will pay time deposit to Swiss Credit Bank on November 19, 1973.	Plaintiff's Exhibit No. 40
(5) June 15, 1973 -- Letter from Silverston to United California Bank.	Plaintiff's Exhibit No. 12
(6) June 19, 1973 -- Letter from United California Bank to Swiss Credit Bank (Vollenweider).	Plaintiff's Exhibit No. 40
(7) June 25, 1973 -- Letter from Swiss Credit Bank to United California Bank.	Plaintiff's Exhibit No. 40
(8) July 16, 1973 -- Telex from United California Bank to American IBC.	Plaintiff's Exhibit No. 40
(9) July 16, 1973 -- Telex from American IBC to United California Bank.	Plaintiff's Exhibit No. 40
(10) July 16, 1973 -- Letter from H. H. Walker (American IBC) to United California Bank.	Plaintiff's Exhibit No. 40
(11) July 18, 1973 -- Telex from United California Bank to Swiss Credit Bank.	Plaintiff's Exhibit No. 40
(12) August 29, 1973 -- Telex from Swiss Credit Bank to American IBC.	Defendant's Exhibit Letter Z

(13) August 29, 1973 -- Telex from American IBC to Swiss Credit Bank.	Plaintiff's Exhibit No. 19
(14) December 5, 1973 -- First telex from Swiss Credit Bank to Wells Fargo Bank stating that $1,046,894.05 was paid to Wells Fargo in error because funds were assigned to Swiss Credit Bank by American IBC.	Defendant's Exhibit Letter N
(15) December 7, 1973 -- Telex from Wells Fargo to Swiss Credit Bank. (Mistakenly described as December 5, 1973 telex)	Defendant's Exhibit Letter P
(16) December 7, 1973 -- Telex from Swiss Credit Bank to Wells Fargo.	Defendant's Exhibit Letter O

7. The two documents numbered (2) and (3) above reflect the transactions referred to in the noted exhibits but were not themselves introduced. In addition, there are two documents which had not been supplied by us to Dr. Kleiner which are referred to in his opinion and copies of which are attached thereto. These also were not admitted in evidence in the trial of this case. One is the Swiss Credit Bank signature card executed by American IBC in 1971 when it started its banking relationship with Swiss Credit Bank. The second document is a printed form containing, among other things, Swiss Credit Bank's "general conditions" of dealing with its customers, which the customer agrees to by executing the signature card document. Dr. Kleiner obtained these documents directly from Swiss Credit Bank. In November of 1974, defendant served a subpoena duces tecum on Swiss Credit Bank requesting all documents relating to American

IBC. The signature card was clearly called for by this subpoena. Swiss Credit Bank, through its New York counsel, provided us with a substantial number of documents, including the general conditions document referred to in the signature card, which we were advised were all of the documents in Swiss Credit Bank's possession, custody or control relating to American IBC. The signature card was not included in these documents. The signature card document itself is routine. Without the signature card, the "general conditions" statement is meaningless and for that reason it was not introduced into evidence by defendant. The signature card contains a provision that the signatory, the customer of Swiss Credit Bank, agrees that its relationship with Swiss Credit Bank will be governed by the general conditions of that Bank. Two provisions of those general conditions are referred to by Dr. Kleiner and his decision is based in part upon those provisions, one of which provides that Swiss law will apply to all relations between American IBC and Swiss Credit Bank and the other of which states that Swiss Credit Bank has a continuing lien on all property of American IBC.

New York, New York

December 15, 1975

Sworn to before me this 15th day

of December, 1975.

Gerald E. Ross

Laurie Okun

Notary Public

LAURIE OKUN
NOTARY PUBLIC, State of New York
No. 31-4601595
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 1976

A 78

OPINION OF DR. KLIENER SWORN TO NOVEMBER 26, 1975

DR. IUR. BEAT KLEINER
PRIVATDOZENT FÜR BANKRECHT
AN DER HOCHSCHULE ST. GALLEN

AFFIDAVIT

Opinion

1. a) I studied law at the university of Zurich and finished those studies in 1954 with the doctors degree (doctor iuris utriusque). I have been admitted to practice law in the canton of Zurich in 1956. I am inhouse counsel for Union Bank of Switzerland, one of the three largest Swiss banks, since 1956 and since 1974 I am the head of the legal department of this bank.

b). Since 1967 I lecture banking law at the Saint Gall Graduate School of Economics, Business and Public Administration. 1971 I achieved my "Habilitation" which makes me eligible to become a full Professor. I presently hold the position of a "Privatdozent". I qualified for that by submitting a inaugural dissertation on the subject of bankguarantees. I published several books and articles, a list of which are attached as exhibit A.

2. I am rendering this opinion at the request of Mr. Gerald Ross of Dunnington, Bartholow & Miller, Attorneys at Law, 161 East 42nd Street, New York, N.Y. 10017, attorneys for Wells Fargo Bank International.

3. For the purpose of this opinion I have reviewed the "summary of Documents sent to Dr. Kleiner", a copy of which is attached as exhibit B as well as the documents described therein. I have also reviewed copies of the signature card of American IBC Corporation

for Swiss Credit Bank, dated August 18, 1971 and Swiss Credit Bank's General Conditions which is referred to in the signature card, documents which have been handed to me by two officers of Swiss Credit Bank and which are attached as exhibit C.

4. I have been asked to give advice with respect to the relations between American IBC Corporation ("AIBC") and Swiss Credit Bank ("SCB") in the period of August 29, 1973 through November 19, 1973, particularly SCB's rights in the proceeds of a forward foreign exchange contract, dated May 15, 1973 with respect to an amount of US$ 1,046,894.05 resp. SFr. 3,182,557.92 which matured on November 19, 1973 ("second foreign exchange contract").

The questions which have been asked of me are as follows:

A. Would a Swiss court apply Swiss law to determine if a third party could obtain an interest superior to that of Swiss Credit Bank in the dollar proceeds of the second forward foreign exchange contract after August 29, 1973?

B. Under Swiss law, could a third party have obtained an interest in the dollar proceeds of the second forward foreign exchange contract superior to that of Swiss Credit Bank after August 29, 1973?

5. a) On August 18, 1971 AIBC went into a banking relationship with SCB and signed the signature card (Exh. C 1). According to the text of such signature card AIBC declared and SCB agreed that the Bank's General Conditions, especially the clause on Applicable Law and Legal Domicile (Article 14) shall apply to the relationship between the two parties. These general conditions state that they are intended to regulate the relationship between the bank and its clients. This means that the whole relationship, namely all

the present and future transactions are governed by those conditions. Art. 14 of those conditions provides that all relations between client and bank are subject to Swiss law.

It is customary for Swiss banks to enter into agreements such as described above and such agreements are valid and enforceable under Swiss law.

b) Therefore, the account relationship between AIBC and SCB as well as the second foreign exchange contract are governed by Swiss law including all questions regarding SCB's right to compensate itself for amounts owed to it by AIBC from funds owed by it to AIBC. During the relevant period AIBC owed substantial sums to SCB and SCB was obliged to deliver the above mentioned amount of Dollars to AIBC at the maturity date of the second foreign exchange contract. Both these claims are governed by Swiss law.

Swiss law also governs all questions regarding the position of SCB against AIBC and any new creditor under an eventual assignment by AIBC to a third party of AIBC's claim against SCB with respect to the proceeds of the second foreign exchange contract (Schönenberger/Jäggi, Zürcher Kommentar zum OR, N 375 ff., insbes. 379; BGE 65 II 83 f.). The same applies with respect to the position against any pledgee (Schönenberger/Jäggi N 355; Oftinger, Zürcher Kommentar, N 110 System. Teil Fahrnispfandrecht; Schnitzer JPR, 3. Auflage, Basel 1950, S. 586).

Any possibility for a third party to obtain rights in the proceeds of the second foreign exchange contract by operation of law, such as "Arrest" and "Pfändung" which I understand to be equal to provisional and final attachment under U.S. law is governed by a Swiss special law, called "Schuldbetreibungs- und Konkursgesetz" dated April 29, 1920.

Therefore, a Swiss court would apply Swiss law to determine if a third party could obtain an interest superior to that of SCB in the dollar proceeds of the second forward foreign exchange contract 1973 after August 29, 1973.

6. Relevant for the answer to the second question are the claim by AIBC against SCB with respect to the proceeds of the second foreign exchange contract and the claim of SCB against AIBC with respect to the debit balance in the current account.

a) According to Art. 271 of the above mentioned law dated April 29, 1920 a third party may attach assets owed to its debtor if such debtor has no domicile in Switzerland. For this purpose the creditor has to satisfy the court that he has a prima facie claim. Such an attachment may be made final if the creditor gets a judgement. Any creditor of AIBC had, therefore, the possibility to attach assets of AIBC with SCB. However, such attachment would have been ineffective with respect to the proceeds of the second foreign exchange contract to the extent that AIBC was indebted to SCB.

According to Art. 8 of the general conditions governing the relations between SCB and AIBC the Bank had a right of lien on all assets whether in its own custody or placed elsewhere for clients' account. The claim of AIBC against SCB with respect to the proceeds of the second foreign exchange contract had to be considered as an asset in the custody of SCB. According to Swiss law a claim against a party may be pledged in favour of such party (Oftinger, Zürcher Kommentar zum ZGB N 16 zu ZGB 899; BGE 36 II 555 und 42 III 453). Due to this lien any attachment would have been ineffective to the above mentioned extent as SCB had with that lien a claim superior to that of any third party under an attachment (SchKG 106; Fritzsche, Schuldbetreibung und Konkurs, 2. Auflage, Zürich 1967, S. 225 f.).

Even if SCB would not have had such lien, any attachment with respect to the proceeds of the second foreign exchange contract would have been ineffective to the above mentioned extent as even in case of an attachement a set-off may be effected, this according to the practice of the Swiss Federal Court (BGE 95 II 235 ff, esp. 240). The set-off is regulated by Art. 120 of the Swiss code of obligations which reads as follows:

> "In the case of money debts or other claims of identical character being mutually owed between two parties, either party may set off his claim, if both claims are due."

This provision requires that both claims be due. It is, however, a well established theory (v. Büren, Schweizerisches Obligationenrecht, Zürich 1964, S. 483 f; Guhl , Das Schweizerische Obligationenrecht, 6. Auflage, Zürich 1972, S. 265) that the wording of such provision is wrong and that this requirement relates only to the claim by the party which effects the set-off, in our case the claim of SCB against AIBC. As SCB was according to its general conditions Art. 12 at any time allowed to terminate business connections and, therefore, to declare its claim gainst AIBC under the current account to be due, it was in the absolute discretion of SCB to fix the due date of such claim. The debt of the party which effects the set-off, in our case the debt of SCB against AIBC, must not be due but only be payable. An obligation may be fulfilled before due date, if there was no agreement to the contrary. Art. 81 of the Swiss Code of Obligations reads as follows:

> "The debtor may discharge his obligation before the due date, unless a different intention appears from the terms of nature of the contract or the circumstances.
>
> The debtor is not, however, entitled to deduct a discount, unless there is some agreement or custom to the contrary."

In our case there was no express agreement of this nature and no element which could lead to assume an implied agreement excluding an earlier payment. There was no interest on the side of AIBC which excluded an earlier payment by SCB. Therefore, SCB was at any time of the relevant period able to declare the overdraft as due and payable and was allowed to make payment under the forward contract No. 2 at any time during this period and, therefore, in a position to set off at any time and even before November 19 within the relevant period, this making any attachment ineffective to the extent mentioned above.

b) If AIBC in breach of contract would have assigned its claim against SCB with respect to the second foreign exchange contract to a third party, SCB would still have been in a position to set off even against such third party. Art. 169 of the Swiss Code of Obligations reads as follows:

> "The debtor is entitled as against the assignee to the benefit of any defences which he had against the assignor's claim, provided they existed at the time when the debtor was notified of the assignment.
>
> The debtor is entitled to set off his counterclaim, even if it was not yet due at such time, provided said counterclaim has not matured at a later date than did the assigned claim."

The counterclaim of the debtor, in our case the claim of SCB against AIBC, could according to Art. 12 of the General Conditions be made due at any time before November 19, 1973.

The same applies to a pledge in favour of a third party (Oftinger, Zürcher Kommentar zum ZGB N 32 zu ZGB 906).

c) There are no other possibilities of a third party to obtain any rights in the proceeds of the second foreign exchange contract apart from those mentioned above. Therefore, under Swiss law a third party could not have obtained an interest in the dollar proceeds of the second forward foreign exchange contract superior to that of SCB to the extent that AIBC was indebted to SCB after August 29, 1973.

Zurich, November 26, 1975

B. Klein

Beat Kleiner

SWISS CONFEDERATION
CANTON AND CITY OF ZÜRICH
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA
ss:

~~Executed before me~~
~~this day 26 th of Novembe 1975~~

CONFEDERATION
ON AND CITY OF ZÜRICH
ULATE GENERAL OF THE
D STATES OF AMERICA
ss:

I, James S. Huffman, Consul of the United States of America at Zürich, Switzerland, duly commissioned and qualified, do hereby certify that on this 26th day of November 75 before me personally appeared Dr. Beat Kleiner

to me personally known, and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument, and being informed by me of the contents of said instrument, he duly acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF I have hereunto set my hand and official seal the day and year last above written.

James S. Huffman
Consul of the United States of America at Zürich, Switzerland
duly commissioned and qualified

BEST COPY AVAILABLE

Artikel:

1959	Ein Diskussionsbeitrag zur deutschen Aktienrechtsreform. NZZ, 1959, Nr. 387, 9.2.59
1964	"Kontokorrentvertrag" und "Girovertrag" in Handbuch des Bank-, Geld- und Börsenwesens der Schweiz, 2. Auflage, 1964
1965	Verarrestierung und Pfändung von Guthaben des Schuldners, die auf den Namen von Drittpersonen lauten. SJZ, 1965, 37 ff. und BlSchKG, 1966, 129ff.
1968	Bankdepot - auswärts liegende Titel und deren Pfändung bezw. Verarrestierung SJZ, 1968, 211ff.
1969	Bankgeheimnis und internationale Rechtshilfe NZZ, 1969, Nr. 290, 13.5.69, 23
1970	Die Neufassung der Bankgesetzgebung in den USA NZZ, 1970, Nr. 494, 23.10.70, 13
1972	Das Bankgeheimnis in der Schusslinie in Kleiner/Hauser/Höhn: Das schweizerische Bankgeheimnis, Bern, 1972, Paul Haupt.
1973	Automation und Mikrofilm im Bankgeschäft aus der Sicht des Juristen. SJZ 69, 146 ff.
1975	Aktuelle Probleme der Bankengesetzgebung (Räumlicher Geltungsbereich der bankengesetzlichen Bestimmungen über die Geheimhaltepflicht und Gegenrecht nach BaG 3 bis) in Schweizer Banken in der Welt von morgen, Bern, 1975, Paul Haupt.
1975	Informationspreisgabe der Bank aus eigenem Interesse in Festschrift Johannes Bärmann, München, 1975, C.H. Beck'sche Verlagsbuchhandlung.

Exh H_2

Bücher:

1954	Die Gemeinschaft der Tarifparteien. Dissertation, Zürich. 1954
1960	Girovertrag - Der Auftrag an die Bank zur Besorgung des Zahlungsverkehrs, Zürich, 1960, Polygraphischer Verlag AG
1964	Die Allgemeinen Geschäftsbedingungen der Banken. Giro- und Kontokorrentvertrag, Zürich. 1964, Polygraphischer Verlag AG (als zweite Auflage der obgenannten Arbeit), vergriffen
1972	Bankgarantie - Die Abgrenzung der Garantie von der Bürgschaft und anderen Vertragstypen, Habilitationsschrift, Zürich, 1972, Schulthess Polygraphischer Verlag AG
1972	Die Gesetzgebung über das Bankwesen in Bund und Kantonen. Zürich. 1972. Schulthess Polygraphischer Verlag AG
1974	Bankgarantie, 2. Auflage

Opinion of Dr. Kliener Sworn to November 26, 1975

Exh 15

Summary of Documents Sent to Dr. Kleiner

1. May 15, 1973 -- Letter from Silverston (American IBC) to Wells Fargo, with four enclosures.

American IBC confirms loan transaction and encloses American IBC's telex instructions to Swiss Credit Bank covering the various parts of the transaction, including instructions to Swiss Credit Bank to convert the Swiss franc proceeds of the time deposit into dollars and pay Wells Fargo the dollars on November 19, 1973. Enclosures:

(A) Telex from American IBC to Swiss Credit Bank. American IBC confirms to Swiss Credit Bank that American IBC purchased 3,130,000 Swiss francs and instructed Wells Fargo Bank International to pay $1,000,000 to Swiss Credit Bank -- Swiss Credit Bank to deliver the francs to United California Bank.

(B) Letter to United California Bank from Silverston. American IBC confirms to United California Bank the deposit of Swiss francs and instructs it to pay the balance on maturity to Swiss Credit Bank -- copies were sent to Swiss Credit Bank, Wells Fargo, and Meridian deposit brokers.

(C) Telex from American IBC to Swiss Credit Bank. American IBC confirms to Swiss Credit Bank the forward sale of francs for dollars on November 19 and instructs Swiss Credit Bank to deliver $1,046,894.05 to Wells Fargo on November 19, 1973.

2. May 15, 1973 -- Swiss Credit Bank form confirming sale of dollars in exchange for Swiss francs on November 19, 1973, the dollar proceeds to be sent to Wells Fargo.

3. May 15, 1973 -- Swiss Credit Bank form confirming spot sale of Swiss francs for dollars to be deposited at United California Bank.

4. May 16, 1973 -- United California Bank confirmation form confirming that it will pay time deposit to Swiss Credit Bank on November 19, 1973.

5. June 15, 1973 -- Letter from Silverston to United California Bank.

American IBC requests that United California Bank advise Swiss Credit Bank that it has "irrevocable instructions" to pay time deposit to Swiss Credit Bank.

6. June 19, 1973 -- Letter from United California Bank to Swiss Credit Bank (Vollenweider).

United California Bank confirms that at maturity it has been instructed by American IBC to pay the time deposit to Swiss Credit Bank.

7. June 25, 1973 -- Letter from Swiss Credit Bank to United California Bank.

Swiss Credit Bank acknowledges that United California Bank will pay 3,130,000 Swiss francs to Swiss Credit Bank on November 19, 1973.

8. July 16, 1973 -- Telex from United California Bank to American IBC.

United California Bank asks American IBC to send an "irrevocable instruction" to pay Swiss Credit Bank; the earlier letter was not clear.

9. July 16, 1973 -- Telex from American IBC to United California Bank.

American IBC states that it has air-mailed irrevocable instructions.

10. July 16, 1973 -- Letter from H. H. Walker (American IBC) to United California Bank.

American IBC states that its instructions to pay Swiss Credit Bank proceeds of time deposit are irrevocable.

11. July 18, 1973 -- Telex from United California Bank to Swiss Credit Bank confirming that their instructions from American IBC are "irrevocable".

12. August 29, 1973 -- Telex from Swiss Credit Bank to American IBC.

Swiss Credit Bank requests permission to apply United California Bank bank deposit to its advances to American IBC.

13. August 29, 1973 -- Telex from American IBC to Swiss Credit Bank.

American IBC states that it should use United California Bank deposit to pay Swiss Credit Bank advances to American IBC.

14. December 5, 1973 -- First telex from Swiss Credit Bank to Wells Fargo Bank stating that $1,046,894.05 was paid to Wells Fargo in error because funds were assigned to Swiss Credit Bank by American IBC.

15. December 5, 1973 -- Telex from Wells Fargo to Swiss Credit Bank.

Wells Fargo states that $1,046,894.05 was applied to a loan made by Wells Fargo to American IBC.

16. December 7, 1973 -- Telex from Swiss Credit Bank to Wells Fargo.

Swiss Credit Bank states that $1,046,894.05 was sent to Wells Fargo by mistake and that said funds do not belong to American IBC.

17. December 10, 1973 -- Letter from Swiss Credit Bank to Wells Fargo.

Swiss Credit Bank states that instructions given to Swiss Credit Bank in May, 1973 to remit proceeds of United California Bank time deposit to Wells Fargo were not irrevocable and that said proceeds were assigned to Swiss Credit Bank by American IBC pursuant to telex dated August 29, 1973. Enclosures:

(A) Telex dated August 29, 1973 from American IBC to Swiss Credit Bank.

18. December 11, 1973 -- Telex from Lilien (Wells Fargo) to Swiss Credit Bank.

Wells Fargo states it was surprised to learn that United California Bank funds were pledged to Swiss Credit Bank and that payment on November 19, 1973 to Wells Fargo was not made in error.

19. General Pledge Agreement dated January 29, 1970 between American IBC and Wells Fargo Bank International.

American IBC Corp.

770 LEXINGTON AVENUE, NEW YORK, N. Y. 10021

HELDON SILVERSTON
PRESIDENT

TELEPHONE (212) 486-1212

May 15, 1973

Wells Fargo Bank
International Corporation
40 Wall Street
New York, N.Y. 10005

Attention: Mr. William F. Boland
Vice-President

Gentlemen:

We confirm having borrowed from you the sum of One Million Dollars U.S. funds value May 17, 1973, maturity November 19, 1973, at an interest rate of 8.5% per 360 days.

Kindly deliver this One Million Dollars to Chase Manhattan Bank New York in favor of Swiss Credit Bank Zurich, reference American IBC Corp., value May 17, 1973.

For your information we have instructed Swiss Credit Bank, Zurich to pay Wells Fargo Bank International Corp. New York the sum of $1,046,894.05 value November 19th ,1973. A copy of these instructions is attached.

On November 19th upon receipt of the foregoing funds in our favor, kindly debit our account the One Million Dollars Principal borrowing plus interest at 8.5 pct. for 360 days for the 186 days i.e. $43,916.67, crediting the balance of the funds to our account with you.

For your information we also attach copies of documents pertaining to this transaction including:

1) Our purchase of Swiss Francs from Swiss Credit Bank value May 17.

2) Our instructions to Swiss Credit Bank to deliver the Swiss Francs to the account of United California Bank for Time Deposit.

(Cont....

CABLE: SHELSILVER · TELEX 421801 AIBC·421121 IBC·233781 IBC·7105814273 SHELSILVER

A 93

Opinion of Dr. Kliener Sworn to November 26, 1975

American IBC Corp. - 2 - May 15,1973

Mr. William F. Boland

3) Our instructions to United California Bank London to pay the Swiss Francs principal and interest to Swiss Credit Bank, Zurich value November 19.

4) Our purchase of dollars from Swiss Credit Bank, Zurich with the above Swiss Francs proceeds and instructions to Swiss Credit Bank, Zurich, to pay you the full dollar proceeds in New York.

Very truly yours,

AMERICAN IBC CORP

Sheldon Silverston

Sheldon Silverston
President

SS/la
Attached.

[illegible] A 94 A

[illegible] *Opinion of Dr. Kliener Sworn to November 26, 1975*

[illegible]

[illegible]

MAY 15, 1973

INCL. #1 AND #2

CREDIT

- - -

ATTENTION MR. RIBI

TELEX NO. 51501

TEST KEY 712

WE CONFIRM WE HAVE PURCHASED FROM YOU 3,130,000 SWISS FRANCS
VALUE 17 MAY 1973 AT THE RATE OF 3.13 SFRANCS EQUAL ONE DOLLAR
U.S. FUNDS. WE HAVE INSTRUCTED WELLS FARGO BANK INT'L CORP.
TO PAY ONE MILLION U.S. DOLLARS IN YOUR FAVOR REFERENCE AMERICAN
IBC CORP TO CHASE MANHATTAN BANK VALUE 17 MAY 1973.
PLEASE CREDIT THE AMOUNT OF UNITED CALIFORNIA BANK LONDON WITH YOU
VALUE MAY 17, 1973 REF: AMERICAN IBC CORP WITH THE SUM OF
3,130,000 SFRANCS.

SHELDON SILVERSTON, PRESIDENT
AMERICAN IBC CORP

MAY 15, 1973

CREDIT

- - -

ATTN MR RIBI

INCL. #4

TELEX NO. [illegible]

TEST KEY [illegible]

WE CONFIRM [illegible] SOLD TO YOU [illegible]

BEST COPY AVAILABLE

Mr. William F. Boland

3) Our instructions to United California Bank London to pay the Swiss Francs principal and interest to Swiss Credit Bank, Zurich value November 19.

4) Our purchase of dollars from Swiss Credit Bank, Zurich with the above Swiss Francs proceeds and instructions to Swiss Credit Bank, Zurich, to pay you the full dollar proceeds in New York.

Very truly yours,

AMERICAN IBC CORP

Sheldon Silverston

Sheldon Silverston
President

SS/la
Attached.

A 95

Opinion of Dr. Kliener Sworn to November 26, 1975

K

American IBC Corp.

770 LEXINGTON AVENUE, NEW YORK, N. Y. 10021

SHELDON SILVERSTON
PRESIDENT

TELEPHONE (212) 486-1212

May 15, 1973

United California Bank London
35/39 Moorgate
London E.C. 2 R6BD
England

Gentlemen:

We confirm having placed with you a Swiss Franc Time Deposit in the sum of 3,130,000 Swiss Francs as follows:

Value date:	17 May, 1973
Maturity:	19 November 1973
Interest rate:	3.25 pct. per 360 days
Amount of interest:	52,557.92 Swiss Francs

We have instructed Swiss Credit Bank Zurich, to credit your account with them under our reference with the sum of 3,130,000 Swiss Francs value 17 May 1973.

At maturity, kindly pay the sum of 3,182,557.92 Swiss Francs to Swiss Credit Bank, Zurich, attention: Mr. Ribi, in favor of American IBC Corp.

Very truly yours,

AMERICAN IBC CORP

Sheldon Silverston
President

SS/la
ccs: Swiss Credit Bank (Zurich)
Wells Fargo Bank (New York)
Meridian [illegible] (London)

[illegible]

[illegible] S[illegible]CS.

SHELDON SILVERSTON, PRESIDENT

AMERICAN IBC CORP

C

MAY 15, 1[illegible]

CREDIT

- - -

ATTN: MR RIBI

INCL #4

TELEX NO. 515[illegible]2

TEXT [illegible] 997

WE CONFIRM HAVING SOLD TO YOU 3,138,557.92 SWISS FRANCS VALUE NOVEMBER 19TH, 1973 AT THE EXCHANGE RATE OF 3.0[illegible] SFRANCS EQUAL ONE DOLLAR U.S. FUNDS.

THE UNITED CALIFORNIA BANK LONDON HAS BEEN INSTRUCTED TO DELIVER THE ABOVE SUM IN SFRANCS TO YOU VALUE NOVEMBER 19TH REFERENCE AMERICAN IBC CORP.

KINDLY DELIVER THE COUNTERVALUE IN U.S. FUNDS (1,[illegible]4.85 DOLLARS) TO WELLS FARGO BANK INTER'L CORP. IN FAVOR OF AMERICAN IBC CORP VALUE NOVEMBER 19, 1973.

SHELDON SILVERSTON, PRESIDENT

AMERICAN IBC CORP

PL CONVEY THE TWO DIFFERENT MESSAGES TO MR RIBI PL

*

[illegible]

[illegible]

[illegible]/73 111 [illegible]

A 97

Opinion of Dr. Kliener Sworn to November 26, 1975

Termin 2

95 [illegible]

Mail to Mr. Hiland

Air-mail

HWEIZERISCHE KREDITANSTALT

ÜRICH

RÉDIT SUISSE
REDITO SVIZZERO
WISS CREDIT BANK

Telefon 01 29 28 11
Telegramme Kredit
Telex 52363
Postcheck 80-500

American IBC Corporation
770 Lexington Avenue

New York, NY 10021 USA

021 Zürich, 15.5.73 De/ja/2517

Gemäss unserer heutigen telefonischen Vereinbarung / Selon notre entente téléphonique de ce jour / As per today's telephone

☐ kauften bzw. übernahmen wir von Ihnen / vous nous avez cédé / we bought from you 1

☒ verkauften bzw. überliessen wir Ihnen / nous vous avons cédé / we sold to you 2

as Zutreffende ist mit × bezeichnet / Ce qui convient est marqué par un × / Please follow the instructions marked with ×

Betrag / Montant / Amount	Auszahlung / Paiement Payment	lieferbar / livrable for delivery	Kurs / Cours Rate	Gegenwert / Contrevaleur Equivalent
$ 1,046,894.05	New York Wells Fargo	19.11.73	3.04	Fr. 3,182,557.92

ir bitten Sie, die beiliegende Gegenbestätigung unterschrieben zurückzusenden · Nous vous prions de nous retourner, dûment signée, la confirmation ci-jointe

lease sign and return the enclosed confirmation

Hochachtungsvoll Vos dévoués Yours very truly

SCHWEIZERISCHE KREDITANSTALT
CREDIT SUISSE SWISS CREDIT BANK

Bestätigungsformular
Confirmation

Visa

Für diese Anzeige genügt eine Unterschrift
Pour cet avis une seule signature suffit
For this advice only one signature is required

Nr. 9733 5.71

A 99

Opinion of Dr. Kliener Sworn to November 26, 1975

4

**UNITED
CALIFORNIA
BANK**

(INCORPORATED WITH LIMITED LIABILITY IN THE U.S.A.)
35-39 MOORGATE, LONDON, EC2R 6BD
TELEPHONE : 01-628 9471

08031

DATE: 16 MAY 73

WE CONFIRM HAVING TAKEN THE FOLLOWING DEPOSIT FROM YOU

FROM	17 MAY 73
TO	19 NOV 73

PAYABLE TO OUR ACCOUNT WITH OUR CORRESPONDENT
SWISS CREDIT BANK ZURICH

CURRENCY	AMOUNT
SWFR	3,130,000.00

PAYABLE BY YOUR CORRESPONDENT

INTEREST			
RATE	NO. OF DAYS	BASIS	
3.25	186	360	= 52,557.08

REPAYABLE TO YOUR CORRESPONDENT
SWISS CREDIT BANK ZURICH

AT MATURITY DEPOSIT PLUS INTEREST WILL BE REPAID BY OUR ABOVE CORRESPONDENT

TOTAL	SWFR	3,182,557.08

MAIL TO

ATTENTION MR. S. SILVERSTONE
AMERICAN I.O.C. CORPORATION
773 LEXINGTON AVENUE
NEW YORK, N.Y. 10021, U.S.A.

BROKER:

AUTHORISED SIGNATURES

A 100

Opinion of Dr. Kliener Sworn to November 26, 1975

American IBC Corp.

770 LEXINGTON AVENUE, NEW YORK, N. Y. 10021

SHELDON SILVERSTON
PRESIDENT

TELEPHONE (212) 486-1212

June 15, 1973

United California Bank London
35/39 Moorgate
London E.C. 2 R6BD
England

Subject: Our Time Deposit with you per your B08031 confirmation of 16 May, 1973 and our letter of 15 May, 1973

Gentlemen:

Subject Deposit matures on 19 November 1973, in the amount inclusive of interest of Swiss Francs 3,182,557.83.

Would you kindly acknowledge directly to the Swiss Credit Bank, Zurich attention- Mr. Alfred Vollenweider, that you have our irrevocable instructions to pay this sum in our favor to Swiss Credit Bank, Zurich.

Your prompt cooperation will be appreciated.

Very truly yours,

AMERICAN IBC CORP

Sheldon Silverston

Sheldon Silverston
President

SS/la

A 101

Opinion of Dr. Kliener Sworn to November 26, 1975

6

Swiss Credit Bank,
8 Paradeplatz,
8021 Zurich,
SWITZERLAND.

19th June, 1973.

Attention Mr. Alfred Vollenweider

Dear Sir,

SWFR 3,130,000.-- deposited with us by
American I.B.C. Corporation, New York
From 17th May, 1973 to 19th November, 1973.

We confirm that at maturity we have been instructed by American I.B.C. Corporation, New York to repay their above mentioned deposit to yourselves in their favour.

Yours faithfully,

Authorised Signature.

IBT/LP

6-7

KREDITANSTALT
Kopie

Fe/vo/ec

June 25, 1973

United California Bank
35/39 Moorgate
London EC2R 6BD

England

Your reference [illegible]

Gentlemen,

Thank you for your letter of June 19, with which you confirm that you will pay us on November 10, 1973 the sum of Fr. 3,120,000.- in favor of the American ESC Corporation, New York, which amount is being deposited with you on time by that company.

Yours very truly,
SWISS CREDIT BANK

BEST COPY AVAILABLE

A 103

Opinion of Dr. Kliener Sworn to November 26, 1975

.21 IBC UI
LBANK LDN

TO AMERICAN IBC CORPORATION NEW YORK

FROM UNITED CALIFORNIA BANK LONDON

ATTENTION MR SILVERSTON

RE YOUR DEPOSIT FOR SWISS FRANCS MATURING 19TH NOVEMBER. AS A RESULT OF YOUR LETTER DATED 15TH JUNE WE CONFIRMED TO CREDIT SUISSE ON THE 19TH JUNE THAT WE HAVE YOUR INSTRUCTIONS TO PAY THEM THE ABOVE SUM PLUS INTEREST AT MATURITY STOP WE DID NOT INCLUDE THE WORD ''IRREVOCABLE'' BECAUSE ALTHOUGH YOUR LETTER ASKED US TO CONFIRM THAT WE HAVE YOUR IRREVOCABLE INSTRUCTIONS, YOU HAVE NOT SPECIFICALLY GIVEN US SUCH AN INSTRUCTION STOP OUR ORIGINAL CONFIRMATION TO CREDIT SUISSE WAS ACKNOWLEDGED BY THEM ON 25TH JUNE BUT WE HAVE AGAIN BEEN ASKED BY THEM TO CONFIRM THAT WE HAVE YOUR IRREVOCABLE INSTRUCTIONS, LEADING US TO BELIEVE THAT THE EMPHASIS IS ON THE WORD ''IRREVOCABLE'' STOP

PLEASE THEREFORE SEND US AN IRREVOCABLE INSTRUCTION TO PAY THE ABOVE-MENTIONED FUNDS PLUS INTEREST AT MATURITY TO CREDIT SUISSE, ZURICH STOP IN THE MANTIME WE WOULD APPRECIATE IT IF YOU WOULD EXPLAIN THE SITUATION TO CREDIT SUISSE, ZURICH WHO ARE AWAITING AN URGENT REPLY

FX SETTLEMENTS DEPARTMENT

STAT [illegible] JULY [illegible]
@11 IBC UI
421121 IBCU
UCAL [illegible]

A 104

Opinion of Dr. Kliener Sworn to November 26, 1975

UCALBANK LDN
RCA 03521 1117
233781 IBC UR

JULY 16, 1973
UNITED CALIFORNIA BANK LONDON
- - - -
SETTLEMENT DEPT:
FROM AMERICAN IBC CORP.
AIRMAILING OUR IRREVOCABLE INSTRUCTIONS IN ACCORDANCE WITH YOUR
TODAY'S TELEX 1427/16 JULY KEN AND PER REQUEST OF SWISSCREDIT
BANK , ZURICH. REGARDS
AMERICAN IBC CORP

UCALBANK LDN
233781 IBC URO

A 105

Opinion of Dr. Kliener Sworn to November 26, 1975

10

American IBC Corp.

770 LEXINGTON AVENUE, NEW YORK, N. Y. 10021

TELEPHONE (212) 486-1212

HERBERT H. WALKER
GENERAL COUNSEL
SECRETARY-TREASURER

July 16, 1973

United California Bank London
35/39 Moorgate
London E.C. 2 R6BD, England

Attention: Settlements Dept.

Gentlemen:

With reference to our exchange of telex messages today, please consider this letter your irrevocable instructions to pay both principal and interest on our Swiss Franc Time Deposit maturing with you on 19 November, 1973 to Swiss Credit Bank, Zurich.

Very truly yours,

AMERICAN IBC CORP.

HERBERT H. WALKER

HHW/la
cc: Swiss Credit Bank
(Att: Mr. Alfred Vollenweider)

CABLE SHELSILVER · TELEX 421001 AIBC · 421121 IBC · 233781 IBC · 7105814273 SHELSILVER

A SKAL CH
BANK LDN

TO CREDIT SUISSE ZURICH

FROM UNITED CALIFORNIA BANK LONDON

18TH JULY 1973

ATTENTION VOLLENWEIDER

TEST 3137

WE CONFIRM THAT WE HAVE IRREVOCABLE INSTRUCTIONS FROM AMERICAN I.B.C. CORPORATION NEW YORK TO PAY YOU S.F. 3,130,000 PLUS INTEREST ON THE 19TH NOVEMBER 1973

FX SETTLEMENTS DEPARTMENT

SENT SCD 1523 18.7.73
52363A SKAL CH
UCALBANK LDN

A 107

Opinion of Dr. Kliener Sworn to November 26, 1975

29.8.1973

12

:/vo/ca

From Swiss Credit Bank, Zurich to **STICHZAHL**

American IBC Corporation, New York, Telex No. 421 121 oder 421 301

Attention: Mr. Sheldon Silverston

~~your payment order 75,000.- Dollars shall execute after receipt of correct test number etc.~~ our bank does not favor Dollar advances at the time and we request your agreement that we can cover the Dollar advance on November 19 by converting the necessary Franc amount from the incoming Francs 3,130,000.- from United California Bank.

BEST COPY AVAILABLE

A 108

Opinion of Dr. Kliener Sworn to November 26, 1975

durch Fernschreibmaschine 13 Fe

N. York

on

52363a skal ch

rca 02350 1044

237781 ibc ur

017579

29 AUG 73 16 03z

aug 29, 1973

credit

- - -

Orig. bei Hr Reilly

atin mr alfred vollenweider

test key number [illegible]

msg no 841

reference your todays msg sal 692 using above test key for today (29 aug)

1) please transfer the 75000 dollars accordance our yesterdays message number 823 in which incorrect test was used.

2) ubs nov 19 paying you 3,182,557.83 swiss francs representing 3,130,000 principal and 52,557.83 interest.

3) this sum of 3,182,557.83 sf sold you value 19 nov 1973 per our conversation with mr ribi and second telex of may 15 to mr ribi atin : at rate of 3.04 meaning for dlrs 1,046,884.05.

4) kindly utilize these dollars to repay all dollar advances (and interest thereon) made to american ibc corp.

regards

sheldon silverston, president

american ibc corp N.York

52363a skal ch

237781 ibc ur

BEST COPY AVAILABLE

A 109

Opinion of Dr. Kliener Sworn to November 26, 1975

14

A1116/350 . 100

23350S WFBI LR

58412T SKAL CH SWISS CREDIT BANK ZURICH DEC 5TH 73 VG

NEW YORK

WELLS FARGO BANK INT NEW YORK URGENT

Kam

WELLS [illegible]
INT [illegible]
1973 DEC -5 [illegible] 35
NEW YORK
CABLE DEPARTMENT

OUR REF FE/FC/ HEI

WE REMITTED TO YOU THROUGH CHASE MANHATTAN BANK NEW YORK ON NOVEMBER 16TH DOLLARS 1.046.894.05 VALUE NOV 19TH IN FAVOUR OF AMERICAN IBC CORP NEW YORK STOP THESE FUNDS WERE SENT TO YOU BY ERROR AS THIS AMOUNT WAS ASSIGNED TO US BY AMERICAN IBC Z CORP WE REQUEST YOU THEREFORE TO PLEASE RETURN TO US THE SUM OF US-DOLLARS 1.046.894.05 KINDLY TELEX REPLY ATTENTION DEPT FE MR A VOLLENWEIDER

[illegible]

[illegible]

[illegible]

FROM: SWISS CREDIT BANK
ZURICH, SWITZERLAND
12/5/73

TEST VERIFIED
15
1,046,894.-

A 110

Opinion of Dr. Kliener Sworn to November 26, 1975

13

[illegible]

WELLS FARGO BANK INTERNATIONAL
TELEGRAM OR CABLEGRAM

No. 1

PLEASE CHECK CLASS OF SERVICE

RATE		NIGHT LETTER		TELEX	X	CHEAPEST	

12/7/73	mg
DATE	WRITTEN
W.F. Boland	
ORIGINATOR	
	W.F. Bol
DEPARTMENT	AUTHORIZED

SEND TO

SWISS CREDIT BANK, ZURICH, SWITZERLAND
ATT: MR.A. VOLLENWEIDER [illegible]

TEST	FIGURED	CHECKED	TEST REQUIRED		MESSAGE		ROUTE	CLASS	CHARGE
			YES	NO	PROCESSED	CHECKED			
				✓	14	14	LL		—

PLEASE DOUBLE SPACE MESSAGE

START HERE

RE YOURS OF 12/5/73

DOLLARS 1,046,894.05 UNABLE TO REPLY WITH YOUR URGENT REQUEST AS FUNDS UTILIZED TO LIQUIDATE OUR ADVANCE TO AMERICAN IBC REFER TO AMERICAN IBC CABLE 5/15/73 ATTENTION MR. RIBI AND FOREIGN EXCHANGE CONTRACTS 15/5/73 DE/JA 2517 - 15/5/73 JA 2517

REGARDS.

BOLAND

WELLS FARGO BANK INTERNATIONAL
1973 DEC -7 PM 12:45
NEW YORK
CABLE DEPARTMENT

DEBIT		INDICATE COMPLETE NAME, ADDRESS AND OUR AND THEIR REFERENCES
BILL		
ABSORB		

7-06 20M 7-73

A 111

Opinion of Dr. Kliener Sworn to November 26, 1975

16

M

12/07/73 0643 EST

422964 WFBI UI

584121 SKAL CH   FM SWISS CREDIT BANK ZURICH 7TH DEC 73 ME

WELLS F

1973 DEC -7

NEW YORK

WELLS FARGO BANK INTERNATIONAL   NEW YORK

OURS DECEMBER 5 NO REPLY RECEIVED PLEASE CONTACT AMERICAN IBC COPRORATION IMMEDIATELY AND REQUEST REFUND OF THE DLS 1.046.894.05 ERRORNEOUSLY TRANSFERRED TO YOU FAVOR AMERICAN IBC AND WHICH DO NOT BELONG TO AMERICAN IBC THANKS YOUR IMMEDIATE ATTENTION SWISS CREDIT BANK ZURICH DEPT FE N VOLLENWEIDER

CREDIT

12/6/73 balance
$282=

FROM: SWISS CREDIT BANK
ZURICH, SWITZERLAND
12/7/73

422964 WFBI UI

FILE COPY

17

CREDIT SUISSE **SWISS CREDIT BANK**

Fe/vo/ee **ZURICH** December 10, 1973

DEC 12 1973

Registered
Special Delivery

Wells Fargo Bank International
40 Wall Street, 26th Floor
New York, N.Y. 10005

Attention: Mr. William F. Boland,
Vice President

Re: American IBC Corporation, New York

Gentlemen,

Thank you for your telex of December 7.

At the time of the conclusion on May 15, 1973, of the foreign exchange contract, we were instructed by American IBC Corporation to remit the amount of $ 1,046,894.05 on November 19, 1973, to your good bank. However, such instructions were given merely for our guidance and were not irrevocable.

With their tested telex of August 29, 1973, of which please find photostat enclosed, American IBC Corporation requested us to utilize on November 19 the amount of $ 1,046,894.05 in cover of advances we were asked to make to American IBC Corporation. Unfortunately, due to a most regrettable oversight, for which please excuse us, the funds were remitted by our foreign exchange department to you instead of being credited to the advance account in our books of the American IBC Corporation, which shows now a debit balance of almost $ 1,000,000.-.

You will appreciate that the funds unquestionably belong to us and we request you to repay them to us without any delay.

Your kind attention will be greatly appreciated.

We remain,

Sincerely yours,

SWISS CREDIT BANK

A 113

Opinion of Dr. Kliener Sworn to November 26, 1975

A

enbüro
usd

Fe Dr Fr

Mitteilung durch Fernschreibmaschine

erhalten von

N. York

523633a skal ch

rca 02350 1044

233781 ibc ur

29 AUG 73 16 03z

017579

aug 29, 1973

credit

- - -

attn mr alfred vollenweider

test key number [illegible]

msg no 841

reference your todays msg sal 692 using above test key for today (29 aug)

Dr

1) please transfer the 75000 dollars accordance our yesterdays message number 828 in which incorrect test was used.

Fr

2) ucb nov 19 paying you 3,182,557.83 swiss francs representing 3,130,000 principal and 52,557.83 interest.

3) this sum of 3,182,557.83 sf sold you value 19 nov 1973 per our conversation with mr ribi and second telex of may 15 to mr ribi attn : at rate of 3.04 meaning for dlrs 1,046,894.05.

4) kindly utilize these dollars to repay all dollar advances (and interest thereon) made to american ibc corp.

regards

sheldon silverston, president
american ibc corp N. York

523633a skal ch

233781 ibc ur

10

WELLS FARGO BANK INTERNATIONAL
TELEGRAM OR CABLEGRAM

No. R-11

PLEASE CHECK CLASS OF SERVICE

L RATE		NIGHT LETTER		TELEX	X	CHEAPEST	

DATE: 12/11/73

ORIGINATOR: C.E. Lilien

DEPARTMENT: C.E. Lili

SEND TO

SWISS CREDIT BANK, ZURICH

ATT: MR. VOLLENWEIDER

TEST	FIGURED	CHECKED	TEST REQUIRED YES	TEST REQUIRED NO	MESSAGE PROCESSED	MESSAGE CHECKED	ROUTE	CLASS
				✓	M	M	LX	

PLEASE DOUBLE SPACE MESSAGE

START HERE

YOUR TELEX DECEMBER 11 REF. FE/VO/EE

SUBJECT : AMERICAN IBC CORPORATION ESXX U.S.$ 1,046,894.05

I REGRET THAT I MUST INFORM YOU THESE FUNDS WERE PLEDGED TO OUR BANK TO SECURE A LOAN AND UPON THEIR RECEIPT WERE APPLIED AFFPLIED TO THE REPAYMENT OF LOAN. WE ARE OF COURSE SHOCKED TO HEAR FROM YOU THAT THESE SAME FUNDS WERE PLEDGED TO YOU AND THAT YOU FEEL THEY WERE TRANSMITTED TO US IN ERROR. XX OBVIOUSLY FROM OUR POINT OF VIEW AND BASED ON LOAN DOCUMENTS AND PLEDGE AGREEMENT IN OUR FILES THE RECEIPT OF THESE FUNDS CONSTITUTED THE FINAL PHASE OF THE ORDERLY LIQUIDATION OF A SECURED TRANSACTION. YOU WILL UNDERSTAND THAT WE CANNOT RETURN THESE FUNDS. YOUR CLAIM SHOULD BE MADE AGAINST AMERICAN IBC CORPORATION. I APPRECIATE THE UNCOMFORTABLE POSITION IN WHICH YOUR BANK FINDS ITSELF AND SINCERELY WISH THAT I WERE IN A POSITION TO HELP SOLVE YOUR PROBLEM, BUT UNFORTUNAT THE FACTS SPEAK FOR THEMSELVES. REGRETFULLY.

LILIEN

DEBIT		INDICATE COMPLETE NAME, ADDRESS AND OUR AND THEIR REFERENCES
BILL		
ABSORB		

WELLS FARGO BANK
INTERNATIONAL
1973 DEC 11 PM 3: 1
NEW YORK
DEPARTMENT

7-06 20M 7-73

A 115

Opinion of Dr. Kliener Sworn to November 26, 1975

GENERAL PLEDGE AGREEMENT

In Consideration of any financial accommodation given, to be given or continued to the undersigned LLS FARGO BANK INTERNATIONAL CORPORATION (hereinafter called Bank), and as collateral security payment of all debts, obligations or liabilities now or hereafter existing, absolute or contingent, of the un-
ned or any one or more of them to Bank (hereinafter called "indebtedness"), the undersigned hereby assign,
fer to and pledge with Bank all money and property this day de~~livered to and de~~posited with Bank, and all
y and property heretofore delivered or which shall hereafter be delivered to or come into the possession, custody or control of Bank in any manner or for any purpose whatever ~~during~~ the existence of this agreement, and whether held in a general or special account or deposit or for safe-keeping or otherwise, together with any stock rights, rights to subscribe, liquidating dividends, stock dividends, dividends paid in stock, new securities, or other property which the undersigned are or may hereafter become entitled to receive on account of such securities or other property, and in the event that the undersigned receive any such property the undersigned will immediately deliver it to Bank to be held by Bank hereunder in the same manner as the property originally pledged hereunder. All money and property assigned, transferred to and pledged with Bank under this paragraph is hereinafter called "collateral".

Bank may accelerate payment of any indebtedness or require additional collateral whenever it deems itself insecure and the undersigned will at all times maintain with Bank collateral of a character and value satisfactory to Bank. The undersigned warrant with respect to all investment securities, instruments, chattel paper, documents, contracts, insurance policies and any like property delivered to Bank as collateral: (a) that the same are genuine, free from liens, adverse claims, default, prepayment, defenses and conditions precedent, except as disclosed thereby and otherwise disclosed or known to Bank; (b) all persons appearing to be obligated thereon have authority and capacity to contract and are bound as they appear to be; and (c) that the same comply with applicable laws concerning form, content and manner of preparation and execution.

At any time, without notice, and at the expense of the undersigned, Bank in its name or in the name of its nominee or of the undersigned may, but shall not be obligated to: (1) notify any person obligated on any security, instrument or other paper subject to this agreement of its rights hereunder; (2) collect by legal proceedings or otherwise all dividends, interest, principal payments and other sums now or hereafter payable upon or on account of said collateral; (3) enter into any extension, reorganization, deposit, merger, or consolidation agreement, or any agreement in anywise relating to or affecting the collateral, and in connection therewith may deposit or surrender control of such collateral thereunder, accept other property in exchange for such collateral and do and perform such acts and things as it may deem proper, and any money or property received in exchange for such collateral shall be applied to the indebtedness or thereafter held by it pursuant to the provisions hereof; (4) make any compromise or settlement it deems desirable or proper with reference to the collateral; (5) insure, process and preserve the collateral; (6) cause the collateral to be transferred to its name or to the name of its nominee; (7) exercise as to such collateral all the rights, powers and remedies of an owner; and (8) perform any obligation of the undersigned hereunder.

Bank may at its option retain in a non-interest bearing cash collateral account any money received by it and need not apply the same to indebtedness secured hereby unless and until such application will cause all indebtedness secured hereby to be paid in full.

Bank shall be under no duty or obligation whatsoever to make or give any presentments, demands for performance, notices of nonperformance, protests, notices of protests or notices of dishonor in connection with any obligations or evidences of indebtedness held by Bank as collateral, or in connection with any obligations or evidences of indebtedness which constitute in whole or in part the indebtedness secured hereunder..

Each of the undersigned waives any right to require Bank to (a) proceed against any person, (b) proceed against or exhaust any collateral, or (c) pursue any other remedy in Bank's power; and waives any defense arising by reason of any disability or other defense of any other of the undersigned or any other person, or by reason of the cessation from any cause whatsoever of the liability of any other of the undersigned or any other person. Until all indebtedness shall have been paid in full: None of the undersigned shall have any right of subrogation, and each of the undersigned waives any right to enforce any remedy which Bank now has or may hereafter have against any other of the undersigned or against any other person and waives any benefit of and any right to participate in any collateral or security whatsoever now or hereafter held by Bank. Each of the undersigned authorizes Bank, without notice or demand and without affecting his liability hereunder or on the indebtedness, from time to time to (a) renew, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness or any part thereof, including increase or decrease of the rate of interest thereon; (b) take and hold security, other than the collateral herein described, for the payment of the indebtedness or any part thereof, and exchange, enforce, waive and release the collateral herein described or any part thereof or any such other security; (c) apply such collateral or other security and direct the order of manner of sale thereof as Bank in its discretion may determine; and (d) release or substitute any other of the undersigned, or any of the endorsers or guarantors of the indebtedness or any part thereof, or any other parties thereto.

Bank may at any time deliver the collateral or any part thereof to any of the undersigned and the receipt of any of the undersigned shall be a complete and full acquittance for the collateral so delivered, and Bank shall thereafter be discharged from any liability or responsibility therefor.

(over)

BEST COPY AVAILABLE

e undersigned agrees to pay prior to delinquency all taxes, charges, liens and assessments against the ral, and upon the failure of the undersigned to do so Bank at its option may pay any of them and shall be le judge of the legality or validity thereof and the amount necessary to discharge the same.

advances, charges, costs and expenses, including reasonable attorneys' fees, incurred or paid by Bank in ding any right, power or remedy conferred by this agreement, or in the enforcement thereof, shall become a f the indebtedness secured hereunder and shall be paid to Bank by the undersigned immediately and without d, with interest thereon at prevailing rate determined by the Bank.

The occurrence of any of the following shall be a default under this agreement (a) failure to pay up any debt secured hereby when due: (b) failure to perform any other obligation secured hereby when the same should be performed; (c) breach of any warranty contained herein: (d) filing of a petition by or against the undersigned under the bankruptcy or like law, receivership, or assignment for the benefit of creditors: (e) attachment or like levy on any property of the undersigned; (f) the occurrence of an adverse change in the financial condition of the undersigned deemed material to Bank: (g) any financial statement made by the undersigned to Bank proves false: or (h) the collateral becomes, in the judgment of Bank, unsatisfactory in character or value: (i) the occurrence of any sale of all or a substantial part of the assets of the undersigned, other than in the ordinary course of business, or (j) the death, insolvency or cessation of business of the undersigned, or any surety or guarantor of any obligation of the undersigned to Bank.

Upon the happening of any default Bank may declare immediately due and payable all indebtedness secured hereby and shall have all rights and remedies provided by law. Any public sale may be held at any branch office of Bank.

Any married woman who signs this agreement hereby expressly agrees that recourse may be had against her separate property for all her indebtedness to Bank secured by the collateral under the terms of this agreement.

Upon the transfer of all or any part of the indebtedness Bank may transfer all or any part of the collateral and shall be fully discharged thereafter from all liability and responsibility with respect to such collateral so transferred, and the transferee shall be vested with all the rights and powers of Bank hereunder with respect to such collateral so transferred; but with respect to any collateral not so transferred Bank shall retain all rights and powers hereby given.

This is a continuing agreement and all the rights, powers and remedies hereunder shall apply to all past, present and future indebtedness of the undersigned to Bank, including that arising under successive transactions which shall either continue the indebtedness, increase or decrease it, or from time to time create new indebtedness after all or any prior indebtedness has been satisfied, and notwithstanding the death, incapacity or bankruptcy of the undersigned or any other event or proceeding affecting the undersigned.

Until all indebtedness shall have been paid in full the power of sale and all other rights, powers and remedies granted to Bank hereunder shall continue to exist and may be exercised by Bank at any time and from time to time irrespective of the fact that the indebtedness or any part thereof may have become barred by any statute of limitations, or that the personal liability of the undersigned may have ceased.

The rights, powers and remedies given to Bank by this agreement shall be in addition to all rights, powers and remedies given to Bank by virtue of any statute or rule of law. Bank may exercise its banker's lien or right of setoff with respect to the indebtedness in the same manner as if the indebtedness were unsecured. Any forbearance or failure or delay by Bank in exercising any right, power or remedy hereunder shall not be deemed to be a waiver of such right, power or remedy, and any single or partial exercise of any right, power or remedy hereunder shall not preclude the further exercise thereof; and every right, power and remedy of Bank shall continue in full force and effect until such right, power or remedy is specifically waived by an instrument in writing executed by Bank.

In all cases where but one party executes this agreement all words used herein in the plural shall be deemed to have been used in the singular where the context and construction so require; when this agreement is executed by more than one party all reference to the undersigned shall mean all or any one or more of them. The obligations and agreements of the undersigned hereunder are joint and several.

IN WITNESS WHEREOF, the undersigned have executed this agreement this 29th day of January, 1970.

American IBC Corp

Sheldon Silverston, President

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Opinion of Dr. Kliener Sworn to November 26, 1975

27. AUG. 1971

26.8.71 10-15 For internal use

firm: AMERICAN IBC CORP.

Business: SWITCH _ TRADE

Registered Office: 770 LEXINGTON AVENUE, NEW YORK 10021, N.Y.

Address: 770 LEXINGTON AVENUE, NEW YORK 10021, N.Y.
(City, street and number)

Specimen signatures

26.8.71 10-15

The persons named below are authorized to represent without restrictions the firm in its relations with Credit Suisse Swiss Credit Bank. In particular they are empowered to operate the current account and or safe custody account of the firm, to contract loans, to sign and endorse checks and bills, to borrow on mortgages or other securities, and to sell, pledge or withdraw securities on behalf of the firm. Regardless of any changes published in the Register of Commerce or otherwise, the signatures below are valid until revoked by special notice to the Bank.

Full name of persons authorized to sign	Specimen of signatures	Form of signature (individually, jointly by two, collectively)
SHELDON SILVERSTON	1 Sheldon Silverston	INDIVIDUALLY
HERBERT H. WALKER	2 Herbert H. Walker	INDIVIDUALLY
	3	
	4	
	5	
	6	
	7	
	8	
	9	
	10	
	11	
	12	
	13	

The undersigned firm authenticates the above signatures and confirms the signing powers indicated above. In addition, the firm approves the Bank's General Conditions, especially the clause on Applicable Law and Legal Domicile (Article 14).

Signature of the Firm

New York, N.Y. August 18, 1971
(Place and date)

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Opinion of Dr. Kliener Sworn to November 26, 1975

CREDIT SUISSE **SWISS CREDIT BANK**

Regulations for the safekeeping of securities and other valuables

A. General Regulations

§ 1 Deposits

Swiss Credit Bank accepts

a) for safekeeping as open deposits:
Securities of all kinds (shares, bonds, debentures, lots, mortgage deeds, etc.) as well as precious metals (gold, silver, etc.);

b) for safekeeping as sealed deposits:
Documents, valuables and other items.

However, the Bank is at liberty to decline, in whole or in part, any proposed deposits without obligation to disclose the reasons for its refusal.

§ 2 Application of General Conditions

The General Conditions apply to every type of safekeeping account.

§ 3 Safekeeping

The Bank undertakes to keep the deposits entrusted to it in its vaults with care.

§ 4 Banking secrecy

Under the Swiss Federal Law on Banks and Savings Institutions, the Bank's administration and staff are bound to strictest secrecy regarding all dealings of the Bank with its clients.

§ 5 Duration of deposit

Deposits are accepted for an indefinite time. The depositor is entitled at any time to request the return of the deposit during customary banking hours. The Bank also has the right to demand at any time the withdrawal of the deposit.

§ 6 Safekeeping receipts

Upon request, the Bank issues duly signed safekeeping receipts to its depositors, containing a detailed description of the objects accepted for safekeeping.

These receipts can neither be transferred nor pledged. The delivery of a deposit is made against receipt.

§ 7 Joint depositors

A deposit may be made in the name of several depositors (Joint deposits). In that case the right of disposal is laid down in a special contract; in the absence of any such arrangements the depositors can only dispose jointly.

The depositors are severally liable for any claims by the Bank in connection with the safekeeping of deposits.

§ 8 Safekeeping fee

The safekeeping fee is computed on the basis of the tariff in force and charged to the client at the end of December of each year.

The Bank reserves the right to alter the tariff at any time. Changes are to be brought to the attention of the depositor.

B. Special Regulations for Open Deposits

§ 9 Safekeeping

The items lodged with the Bank for safekeeping are held separately for each depositor, classified according to individual categories and segregated from the Bank's own securities. At the time of withdrawal, the client receives the items which he deposited.

The depositor agrees that the items in his safekeeping account, or a part thereof, be placed by the Bank in collective deposit (Art. 484 Swiss Code of Obligations), either within the Bank itself or with a central deposit facility. The depositor will have a right of co-ownership in such collective deposit proportionate to the number of items deposited by him.

§ 10 Deposits abroad

Unless other arrangements have been made, the items which are to be held abroad will be placed by the Bank in its own name, but for account and at the risk of the depositor with one of the Bank's correspondents for safekeeping and administration according to the rules prevailing in that country.

§ 11 Management

From the day a safekeeping account is established, the Bank will attend, without specific instructions from the depositor, to:
the collection or realization at best, of dividends and interests due,

the control of drawings, calls for redemption, conversions and amortizations of securities, as well as the collection of securities called for redemption according to lists at its disposal, without, however, assuming any responsibility therefore,

the obtaining of new coupon sheets and the exchange of provisional securities for definitive bonds or shares.

Upon written request received in good time from the depositor, the Bank will further effect conversions, pay instalments on partly paid-up securities, receive interest and capital repayments on mortgages, call mortgages for payment and effect their collection, exercise subscription rights or effect their sale. If the Bank does not receive instructions to the contrary from the client until the day preceding the last official quotation of the rights, it is entitled to sell the rights at best.

§ 12 Amounts collected

Amounts collected will be placed to the credit of a Swiss franc account in the name of the depositor, unless he has given other instructions in good time.

§ 13 Insurance

Unless instructed to the contrary, the Bank arranges for insurance covering the transport of valuables at the client's expense where such insurance is usual and can be covered under its own policy with a Swiss Insurance Company.

§ 14 Coupons

The safekeeping fee includes compensation for detaching coupons and the expenses for collecting coupons and securities payable at the Bank's Head Office or Branches. For obtaining new coupon sheets and exchanging provisional securities the Bank charges its own expenses only.

§ 15 Administration of assets, wills and testaments

Under special arrangements the Bank also undertakes the administration of fortunes, settling of estates, execution of last wills, as well as the safekeeping of last wills, inheritance contracts, etc.

C. Special Regulations for Sealed Deposits

§ 16 Tender

Sealed deposits must, as a rule, be provided with a declaration of their value. They must bear on their cover the full name and address of the depositor and be sealed with wax, lead, etc., in such a manner as to make it impossible to open the cover without damaging the seal. They are to be handed in with a declaration on a special form bearing the signature and, if possible, the seal of the depositor.

§ 17 Contents

Sealed deposits may only contain valuables and documents, but on no account inflammable or dangerous or other objects unsuitable for safekeeping in banking premises. The depositor is liable for any damage caused by failure to observe this requirement.

The Bank is entitled to ask the client for evidence as to the nature of the objects deposited.

§ 18 Liability

The Bank's liability is limited to the declared value of the deposit. Any damage must be proved.

On withdrawal of the deposit the client must ascertain that the wax or lead seal is in an undamaged condition. The receipt signed by the customer on withdrawal of the deposit discharges the Bank of all liability.

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Opinion of Dr. Kliener Sworn to November 26, 1975

DIT SUISSE SWISS CREDIT BANK

ral Conditions

General Conditions are intended to regulate clearly the relationship between the Bank and its clients. Special agreements are reserved. Certain business categories are subject to particular regulations as well as to banking usage.

Art. 1 Power of Disposition

For the Bank, the signatures communicated to it in writing are valid until revoked by written notice, regardless of any changes published in the Register of Commerce or otherwise.

Art. 2 Examination of Signatures and Identity

The Bank undertakes to examine the signatures of its clients and their mandataries carefully. It is not bound to make further examinations of identity. No responsibility is assumed for the consequences of falsifications or faulty identifications which, despite observing usual care, were not detected by the Bank.

Art. 3 Incapacity to act

The client is liable for damage resulting from his incapacity to act, unless this has been the object of an official publication in Switzerland. The client is responsible in all cases for any damage resulting from incapacity to act of the client's attorney or of any third party.

Art. 4 Communications from the Bank

Communications from the Bank are considered to have been made if sent to the latest address supplied by the client. The date indicated on the copies or on the mailing list in possession of the Bank is assumed to be the time of dispatch. Mail to be retained by the Bank is considered to be delivered on the date it bears.

Art. 5 Errors of Communication

Damage resulting from the use of the postal services, telegraph, telephone, telex and any other means of communication, and resulting especially from loss, delay, misunderstanding, mutilation or double dispatch, is to be borne by the client, provided the Bank has not acted with gross negligence.

Art. 6 Inadequate Execution of Instructions

If damage is due to the non-execution or late execution of instructions (with the exception of stock exchange orders), the Bank is liable only for the loss of interest unless attention had been drawn in a particular case to the risk of more extensive damage.

Art. 7 Complaints

Complaints of a client connected with the execution or non-execution of an instruction of any kind must be lodged immediately on receipt of the particular advice or at the latest within the period specified by the Bank. If the Bank fails to send an advice, the client must lodge his complaint at the time when he would normally have received this advice by mail. Any damage is borne by the client, if the complaint is delayed.

Objections concerning statements of account have to be submitted within the period of one month. On expiry of this period the statements are considered as approved even in those cases where acknowledgment forms requested by the Bank in certain circumstances have not been received by it. The express or tacit approval of the Statement of account includes the acceptance of all entries it contains as well as possible reserves on the part of the Bank.

Art. 8 Right of Lien and Set-off

The Bank has a right of lien on all assets whether in its own custody or placed elsewhere for client's account, and as regards funds in account a right of set-off against all its claims, irrespective of due dates or currencies in which they are maintained and whether a credit line has been granted unsecured or against special securities. As soon as the client defaults, the Bank is authorized to dispose of the securities as it chooses, either by enforced sale or privately.

Art. 9 Current Accounts

The accounts are balanced at the end of each quarter, half-yearly or yearly, at the Bank's discretion. Periodical statements of account may be substituted by daily statements. No deductions are allowed on interest and commissions due to the Bank. Any expenses, taxes or other dues are to be borne by the client. The Bank reserves the right to change its interest and commission rates at any time according to the market situation. It will advise the client of such change by way of circular letter or in any other suitable form.

If the client gives several instructions, the total amount of which exceeds his credit balance or the facilities granted to him, the Bank is entitled to carry out the instructions at its discretion, in whole or in part, irrespective of the date they bear or of their receipt by the Bank.

Art. 10 Accounts in Foreign Currencies

The client's deposits in foreign currencies are placed in the name of the Bank, but for the client's account and at his risk, with correspondents in or outside the respective currency area. In particular, the client accepts the risk resulting from legal or administrative restrictions, and bears any taxes and charges imposed in the countries involved.

The client may dispose of his funds in foreign currencies by sales or by transfers as well as by drawing or purchasing checks; he cannot dispose of the funds in other forms except by consent of the Bank.

Art. 11 Drafts, Checks and Similar Instruments

The Bank has the right to debit the client's account with drafts, checks or similar instruments, previously credited or discounted, in the case of their non-payment. Pending the settlement of the debit balance, the Bank, however, retains a claim to payment of the total amount of the instrument plus related expenses against any party to the instrument, irrespective whether such claim emanates from the instrument or exists for any other legal reason.

Art. 12 Termination of Business Relationship

The Bank reserves the right to terminate existing business connections at any time and at its own discretion, in particular to cancel credit lines granted and to request the repayment of debts of any nature without previous notice.

Art. 13 Saturday an Official Holiday

In all business connections with the Bank, Saturday is treated as an official holiday.

Art. 14 Applicable Law and Legal Domicile

All relations between client and Bank are subject to Swiss law. The place of performance, the venue for legal action against clients domiciled abroad, and the sole place for any proceedings at law is in the town where the office concerned of the Bank is situated. The Bank has, however, the right to take legal action before the courts at the client's domicile or before any other competent court.

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALAN B. MILLER, as Trustee in Bankruptcy of AMERICAN IBC CORP., Bankrupt,	:	
Plaintiff,	:	
v.	:	74 Civ. 3714(MP)
WELLS FARGO BANK INTERNATIONAL CORP.,	:	
Defendant.		

OPINION AND FINDINGS

APPEARANCES:

WEIL, GOTSHAL & MANGES
Attorneys for Plaintiff
767 Fifth Avenue
New York, N.Y. 10022
By: Charles Seligson, Esq.
Harvey R. Miller, Esq.
Robert A. Weiner, Esq. and
Frederic J. Leffel, Esq. of Counsel

DUNNINGTON, BARTHOLOW & MILLER
Attorneys for Defendant
161 East 42nd Street
New York, N.Y. 10017
By: Charles L. Stewart, Esq.
Gerald E. Ross, Esq. and
Roger R. Crane, Esq. of Counsel

MILTON POLLACK, District Judge.

MILTON POLLACK, District Judge.

This is a plenary suit by a trustee in bankruptcy to recover, as voidable preferences, two loan repayments made by the bankrupt to the defendant bank in November 1973. Jurisdiction is conferred on the Court by 11 U.S.C. § 46 and 28 U.S.C. § 1331. The case was presented at a bench trial and has been fully briefed by the parties.

The plaintiff, a Trustee in Bankruptcy of American IBC Corporation (hereafter "AIBC"), was appointed on April 2, 1974. AIBC is a Delaware corporation which, among other activities, engaged in international currency transactions and other overseas investment. Its principal offices were in New York City. The defendant Wells Fargo Bank International (hereafter the "New York Bank"), an international bank which is a wholly owned but independently operated subsidiary of Wells Fargo Bank, N.A., of San Francisco, also maintains its principal office in New York City.

In April 1973 AIBC wished to engage in currency arbitrage involving dollars and Swiss Francs. It approached the New York Bank with whom it had a relationship and two loan transactions resulted. The New York Bank made two six-month loans of $1,000,000 each to AIBC on May 3 and 17, 1973, respectively, which were to be repaid in full in November of that year. AIBC used the funds in two separate currency arbitrage transactions with the Swiss Credit Bank in Zurich (hereafter, the "Swiss Bank") in which the dollars were first exchanged into Swiss Francs, the latter were held in interest-bearing time deposits in Europe, and on maturity thereof six months later the Swiss currency was exchanged back into dollars at a rate of exchange which was fixed initially and was favorable to AIBC.[1/]

The arbitrage transactions proceeded according to plan, and the New York Bank received repayment of the two loans, with interest, on the maturity dates of November 2 and November 19, 1973. Within four months thereafter, however, an involuntary petition in bankruptcy was filed against AIBC, on January 29, 1974, and the company was adjudicated bankrupt on February 14, 1974.

The New York Bank has put forward a number of different legal theories to support its contention that the two loan repayments are beyond the reach of the bankruptcy statutes, and did not constitute preferential transfers voidable by the Trustee. The Bank argues, alternatively, that (1) it was a secured party in that the two loans were secured by pledges of the Swiss Franc time deposits and the repayments were merely the liquidation of the collateral; (2) that it became an assignee in May of either the Swiss Franc time deposits or AIBC's right to receive dollars under the foreign exchange contracts with the Swiss Bank; (3) as to the second loan, the November 19 repayment was not a transfer of the bankrupt's property because AIBC had already assigned those funds in August to the Swiss Bank, which forwarded them to New York by mistake in November; and (4) without regard to the pledge or assignment theories, the satisfaction of the loans by debits to AIBC's account in November constituted a valid set-off by the New York Bank beyond reach of the Trustee. The defendant also denies the Trustee's contention that it had reasonable cause to believe AIBC was insolvent at the times of the loans and repayments.

On the basis of the record, the Court finds that the two repayments to the defendant Bank, on November 2 and 19, 1973, constituted preferential transfers under § 60 of the

Bankruptcy Act, 11 U.S.C. § 96; and since the Court also finds that the defendant Bank had reasonable grounds to believe AIBC was insolvent in November 1973, the funds may be recovered by the Trustee for the benefit of the bankrupt's estate. As is discussed hereinafter, none of the Bank's legal theories is supported in the evidence; they are in the nature of _ex post facto_ rationalizations which are neither persuasive nor tenable.

I. The Elements of a Preference

A transfer is preferential under § 60(a)(1) of the Bankruptcy Act, 11 U.S.C. § 96(a)(1), only if it satisfies all the elements of that statute. It must (1) transfer the property of the debtor, (2) to or for the benefit of a creditor, (3) for or on account of an antecedent debt, (4) at a time when the debtor is insolvent, (5) within four months before the filing of a bankruptcy petition, and (6) enable one creditor to obtain a greater percentage of his debt than some other creditor of the same class. In addition, the trustee may void a transfer deemed preferential under § 60(a)(1) only if, under § 60(b), the creditor receiving it had reasonable cause to believe the debtor was insolvent at the time the transfer was made.

It is apparent that, if the defenses of the defendant Bank fall, all six elements of a preferential transfer are present in the facts of this case. The repayments on November 2 and 19 were made from the bankrupt's assets[2/] for the benefit of the New York Bank, its creditor, in order to extinguish the antecedent debts incurred by the bankrupt the preceding May. Furthermore, the parties have stipulated that AIBC was insolvent at all times on and after June 1, 1973; the payments in November took place within four months of the filing of the bankruptcy petition in January, and the defendant Bank, by receiving payment in full of the bankrupt's obligations, clearly received a greater percentage of its debt than similarly-situated bankruptcy claimants. All that remains for the Trustee to prove is that the defendant Bank had reasonable cause to believe AIBC was insolvent at the time the payments were made.

This analysis of the facts must be altered considerably, however, if any of the defendant's defenses mentioned previously are sustained. The New York Bank's pledge and assignment theories affect the dates on which the transfers of AIBC's property would be deemed to have occurred under the Bankruptcy Act, for § 60(a)(2) of the Act defines the time a transfer occurs as "the time when it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee."[3/] Thus, the transfers at issue here would not be deemed to have taken place within four months of bankruptcy if a valid pledge or assignment had been furnished to the defendant and had become enforceable against third parties prior to that time. See Bachner v. Robinson, 107 F.2d 513, 515 (2d Cir. 1939). As to the New York Bank's other defenses, a valid set-off is accorded statutory protection from preference attack; and the allegation that the second loan repayment came from the assets of the Swiss Bank, not the bankrupt, rebuts the existence of the first element of a preferential transfer.

Consequently, in order to determine whether the two November payments constituted a voidable preference, this Court must first decide whether the defendant Bank had reasonable cause to believe that the bankrupt was insolvent in November 1973; if it did, the Court must then evaluate each of the defenses asserted by the

New York Bank. Since the details of the two loans vary, the analysis of the defendant's pledge and assignment theories will be undertaken separately for each loan.

II. Reasonable Cause to Believe AIBC Insolvent

The Trustee need not prove that the New York Bank had actual knowledge of the bankrupt's insolvency in order to defeat a preferential transfer under § 60(b) of the Bankruptcy Act. Instead, the plaintiff need show only that the transferee had "reasonable cause to believe that the debtor [was] insolvent" at the time the transfer was made. Section 60(b), 11 U.S.C. § 96(b) (1970); 3 Collier on Bankruptcy ¶ 60.36, at 913 (14th ed. 1975) (hereafter "Collier").

A "mere suspicion" that the transferor is insolvent does not constitute "reasonable cause." Grant v. First National Bank, 97 U.S. 80 (1878); In re Hygrade Envelope Corp., 366 F.2d 584 (2d Cir. 1966). Reasonable cause is established, however, where the creditor has notice of "such a state of facts ... respecting the affairs and pecuniary condition of the transferor as would lead a prudent business person to the conclusion that the transfer is insolvent." Robinson v. Commercial Bank of North Americ

320 F.2d 106, 107 (2d Cir. 1963). Moreover, the creditor may not "close his eyes" to preserve his ignorance of the debtor's true condition, and is chargeable with notice of all facts which a reasonably diligent investigation would have disclosed, where a person of ordinary prudence would have made inquiry. Id. The New York Bank may not be absolved from a duty of inquiry because, believing itself a secured creditor, it did not need to look to the bankrupt financial standing as the basis for its decision to extend credit. See Clower v. First State Bank, 343 F.2d 808, 811 (5th Cir. 1965) (bank held to reasonable cause standard, including duty of inquiry, despite its reliance on solvent accommodation endorser of debtor's note). See also G.F. Wertime, Inc. v. Turchick, 358 F.2d 802 (2d Cir. 1966) The Bankruptcy Act makes no exception to its reasonable cause requirement in favor of creditors who do not rely on the credit standing of their debtors. See Clower v. First State Bank, supra.

The defendant Bank emphasizes that it received its loan repayments precisely as had been scheduled six months earlier, and that it did conduct a general credit check of AIBC in the fall of 1973 which produced no adverse reports from the other banks with whom the bankrupt did business. The Bank submitted in evidence a Dun & Bradstreet business information report on AIBC dated October 3, 1973 which listed the company's "record" as "clear". Finally, while the documentary evidence shows that the New York Bank was aware in the summer of 1973 that the Banco de la Republica in Bogota, Colombia, was suspicious of AIBC and had severed relations with it in a dispute over an international currency transaction, the defendant has demonstrated in the record that it was advised in September 1973 that the problem had been resolved and the whole matter settled by AIBC.

Nonetheless, there is no doubt that the New York Bank had notice of facts which would have led a prudent business person to the conclusion that AIBC was insolvent, or which at the very least would have incited a man of ordinary prudence to make inquiry of AIBC's affairs. *In re Hygrade Envelope Corp.*, *supra*, 366 F.2d at 586-587.

We start with the undeniable fact that the Bank did not regard AIBC as generally creditworthy and anticipated obtaining full security in any transactions with it. The New York Bank was aware that AIBC was very thinly capitalized --

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Plaintiff's Exhibit 50

AMERICAN I B C CORP.

BALANCE SHEET

MAY 31, 1972

ASSETS

CURRENT ASSETS IN U.S.A.			
Cash in Banks - Schedule Attached		76,629.71	
Cash Sur. Value Off. Life Ins.		7,433.00	
Due from George Worns - Note #1		171,320.00	
Loans Rec.-Secured by Letters of Credit		477,935.69	
Loans Receivable		2,400.00	
Loans Receivable - United Brands Inc.		573,404.26	
Notes Rec.United Brds. Discounted Without Recourse - Note #2		2,150,000.00	
Due from United Brands - Note #3		96,000.00	
Exchanges		2,185.57	
TOTAL CURRENT ASSETS U.S.A.			3,556,409
CURRENT ASSETS - FOREIGN COUNTRIES			
Cash in Foreign banks - Sched. Attached		19,006.87	
Accounts Receivable - Peru - Note #4		28,478.00	
Loans Rec.-Secured by Letters of Credit		217,596.80	
Loan Rec.- La Reforma (105,988.83DM)		33,386.32	
Demand Loan - (4,000,000 Pesos)		210,527.00	
Colombia Treasury Bills - S.A.		378,015.12	
Cedula Investment Colombia, S.A.		1,327,461.00	
TOTAL CURRENT ASSETS - FOREIGN			2,214,471
FIXED ASSETS IN U.S.A.			
Loans Rec. Secured by Letters of Credit		208,625.93	
Loans Receivable		8,400.00	
Furniture & Fixtures	45,550.00		
Less: Reserve for Depreciation	6,323.00	39,227.00	
Leasehold Improvements	29,500.46		
Less: Reserve for Depreciation	8,562.00	20,938.46	
Organization Expense Balance		100.00	
Security & Deposits		4,946.66	
TOTAL FIXED ASSETS U.S.A.			282,23
FIXED ASSETS IN FOREIGN COUNTRIES			
Loans Rec. Secured by Letters of Credit		95,250.00	
Loans Rec.-La Reforma (529,941.65 DM)		166,931.60	
TOTAL FIXED ASSETS-FOREIGN			262,18
OTHER ASSETS			
Investments - Note #5		1,084,081.53	
Colombia Partners-A.IBC Equity - S.A.		340,031.17	
Euro Sales		1,017.63	
United Brands - Due for Services		36,742.80	
Deferred Charges		1,500.00	
TOTAL OTHER ASSETS			1,463,37
			7,778,67

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in connection with the fulfillment of the settlement's terms.

Although the effect the settlement would have had on AIBC had it been consummated is not entirely clear on the record before the Court,[5/] no implementation of the provisions of the settlement ever took place. The New York Bank was also aware of that fact, since it had been instructed that the arrangement would be terminated on a given date unless it had been advised, as escrow agent, that a subsequent agreement had been reached; the Bank was never so advised.[6/]

Thus, the Bank was aware that AIBC was in jeopardy of losing -- and indeed might already have lost -- up to $3,000,000 of its assets.[7/] Moreover, the very terms of the proposed agreement, of which the Bank was clearly aware, provided that in the event the settlement were terminated Lara and Ospina were to be released from a pre-existing debt to AIBC of $1,250,000. Given AIBC's net worth, the Bank's awareness of those facts constituted more than "mere suspicion." At the very least it gave rise to a duty to investigate AIBC's financial affairs, which investigation would have disclosed the uncontroverted fact that AIBC was insolvent, at least after June 1, 1973. Indeed, when the Bank eventually did conduct an inquiry in December 1973, it concluded that AIBC's insolvency was attributable in large part to the "fiasco in Colombia" through which it "lost lots of assets."

The Bank also ignored other signals, apart from the Colombian episode, which suggested the seriousness of AIBC's condition. AIBC was not responsive to the Bank's requests for financial statements for the 1973 fiscal year; indeed, the very Dun and Bradstreet report the Bank relies upon indicated that the bankrupt had "declined all financial information." Moreover, AIBC did not answer the Bank's belated request, in August 1973, for a signed promissory note in connection with the second loan which had been granted the preceding May. Finally, while relevant only to the second loan payment, the Bank learned on November 9 and 11, 1973 in the course of its general credit check that Chemical Bank had closed AIBC's account and that National Bank of North America refused to comment on its relationship with the company.

Although these items alone are not dispositive, in conjunction with the evidence concerning the loss of AIBC's

Colombian assets they support the inference and conclusion that the Bank's failure to obtain prompt explanations of the omissions and unresponsiveness mentioned and to conduct a diligent inquiry into AIBC's financial affairs represented an inexcusable indifference to what could be ascertained and to the truth which may not be condoned at the expense of other creditors in bankruptcy.

In view of the foregoing analysis, there is no need to reach the argument of the Trustee that the New York Bank had actual knowledge of AIBC's insolvency at the time the second payment was made on November 19. This assertion hinges on the testimony of Sheldon Silverston, the president of AIBC, that he met with an officer of the New York Bank on the morning the second loan repayment was due and informed him that AIBC was in serious financial difficulty The Bank officer, William Boland, testified that he met Silverston for lunch that day but denied that any meeting took place in the morning or that Silverston advised him of AIBC's reverses. Silverston's testimony does not appear sufficiently trustworthy to support a finding of fact in favor of the Trustee on this matter, and no reliance will be placed upon it.[8/]

Since the Court finds that the defendant Bank did have reasonable cause to believe that AIBC was insolvent on November 2 and 19, 1973, it is necessary to examine the Bank's contentions that the two loan repayments should not be characterized as preferential transfers.

III. The Affirmative Defenses of the New York Bank

A. Set-Off; Both Loans

The Bank asserts that, wholly apart from its status as a secured creditor, its receipt of funds on November 19 constituted a legitimate set-off of the debt owed it by AIBC and was not a transfer subject to recovery by the Trustee as a preference. While the Bank does not make the point, its set-off argument is also applicable to the repayment of the first loan on November 2 and shall be considered in regard to both loans here.

Section 68 of the Bankruptcy Act, 11 U.S.C. § 108, provides that "[i]n all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor," the debts shall be set off against one another. Such a set-off may not be recovered as a preferential transfer under § 60 by the bankruptcy trustee. See New York

County National Bank v. Massey, 192 U.S. 138, 147 (1904). Section 68 is applicable where the bankrupt makes a deposit in his bank account in good faith and in the due course of business, and where the deposit is subject to withdrawal at the will of the depositor. *See Joseph F. Hughes & Co. v. Machen*, 164 F.2d 983, 987 (4th Cir. 1947), *cert. denied*, 333 U.S. 881 (1948).

If the deposit is accepted by the bank with an intent to apply it "on a pre-existing claim against the depositor rather than to hold [it] subject to the depositor's checks in ordinary course," however, the deposit is viewed legally as a transfer in payment of the debt. As such, it may be recovered by the trustee where the elements of a voidable preference are otherwise satisfied. *Goldstein v. Franklin Square National Bank*, 107 F.2d 393, 394 (2d Cir. 1939); *Mayo v. Pioneer Bank & Trust Co.*, 270 F.2d 823, 836 (5th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960); 4 *Collier* ¶ 68.16[2] at 919-920.1.

The deposits to AIBC's account on November 2 and 19 were clearly made and accepted by the New York Bank as payments of AIBC's debts, not as ordinary deposits.

Thus, the Bank's internal documents record the credits made to AIBC's account and the subsequent debits in favor of the Bank as "Repayment of advance" of May 3 and May 17, 1973, and "re: your [AIBC's] letter 5/15/73."

Since the Bank at no time intended to treat the payments as ordinary deposits into AIBC's account, it may not invoke the sanction of § 68 to protect itself from the Trustee's action under § 60.

B. Pledge and Assignment: The First Loan

Section 60(a)(2) of the Bankruptcy Act incorporates state law to determine the date on which a transfer is deemed perfected against subsequent lien creditors. See McKenzie v. Irving Trust Co., 323 U.S. 365, 370 (1945). The parties agree that the law of New York should be held applicable to the transactions betweeen the New York Bank and the bankrupt.[9] The question this Court must decide, therefore, is whether AIBC's purported pledge to the New York Bank of its [illegible]ss Franc time deposit, or the alleged assignement of its foreign exchange contract or the time deposit, were valid and enforceable under the law of New York, and if so, when they were perfected.

1. Pledge of the Time Deposit. The Bank's theory that it was the holder of a secured interest in the form of a pledge must fail. While the evidence does demonstrate an intention to pledge to the Bank the Swiss Franc time deposit which AIBC maintained at the Wells Fargo Bank in Luxembourg (hereafter, the "Luxembourg Bank"), no delivery of it or of some evidence of it into the possession and control of the New York Bank ever took place. As is shown below, delivery to the pledgee is essential to the validity of a pledge. Absence of such delivery leaves the debtor in control of the property, and as to other creditors, with the deceptive appearance of complete ownership. The issuance by the Luxembourg Bank to AIBC of a clean receipt for the time deposit, and the failure of the New York Bank to have the receipt recalled or modified to reflect its pledge, are thus fatal to the defendant Bank's pledge claim. Furthermore, even if that were not the case, any pledge which may have existed was lost when the Luxembourg Bank forwarded the deposited funds on November 2 to the Swiss Bank, which had no notice of the New York Bank's interest.

The intention of the New York Bank and AIBC was manifested in an exchange of letters outlining the first loan transaction. Sheldon Silverston, AIBC's president, wrote on April 30, 1973 that the Swiss Franc time deposit "is lodged with you as collateral for the One Million Dollar loan and is subordinated to such loan." The Bank responded in a letter dated May 2 that "You have agreed to lodge with us as collateral the Swiss Franc time deposit...." Finally, the Bank's internal loan authorization form notes the "Time Deposit with WFB/Lux as collateral."[10]

The defendant Bank contends that the pledge agreement was perfected in that the Luxembourg Bank, with whom the deposit was maintained, had notice of the New York Bank's pledge. The evidence presented to prove that the Luxembourg Bank had such notice is not free from ambiguity. Both the receipt issued to AIBC for the time deposit and the telex sent from Luxembourg to the New York Bank confirming the deposit make no reference to a pledge. The time deposit was arranged for AIBC by the New York Bank, however, and a telex from Luxembourg to New York dated April 20, 1973 stated that "I assume that this swiss franc deposit placed with Lux will serve as collateral for a dlrs 1 mil loan made by yourselves to your new york customer." The New York Bank claims that it responded to this query by mailing to Luxembourg a carbon copy of the May 2 letter outlining the transaction which has been quoted above in pertinent part. While it would have been more persuasive had the defendant Bank submitted into evidence the actual copy received by its Luxembourg affiliate instead of a copy from defendant's files which was marked with a handwritten blind carbon copy notation, the Court will assume that the copy was sent and as a result that the Luxembourg Bank had notice of an intended pledge to the New York Bank.

The law of New York provides that delivery of pledged property or of an instrument evidencing it to a pledgee or possession of the same by the pledgee is "fundamental" to the validity of the pledge.[11] _See_ _McCoy v. American Express Co._, 253 N.Y. 477, 482, 171 N.E. 479 (1930). A pledge is also enforceable where such delivery is made to an agent of the pledgee and not the pledgee himself. _Id._, at 483. Even if the Luxembourg Bank may be considered the New York Bank's agent,[12] however, a pledge was not perfected by AIBC's delivery of Swiss Francs to the Luxembourg Bank because the latter bank thereupon issued to AIBC a document acknowledging that AIBC was entitled to the time deposit.

The defendant's analysis ignores the character of the subject matter and what it takes to possess its control; a time deposit is deemed by the common law to be a non-negotiable chose in action. 5 N.Y. Juris., Banks & Trust Cos. § 207 (1959). Since the delivery or possession of a chose in action (in essence here, the Luxembourg Bank's obligation to pay AIBC, its depositor and creditor) presents conceptual difficulties, the courts have evolved the doctrine by which ownership of such an intangible may be obtained by possession of a document which represents the chose in action and is deemed indispensable to its control. See Annot., 53 A.L.R.2d 1396 (1957). Thus, the New York courts hold a pledge of a savings account is valid where the passbook representing it is delivered to the pledgee. See, e.g., In re Hoffman's Estate, 175 Misc. 607, 25 N.Y.S. 2d 339 (Sur. Ct. 1940).

Neither the New York nor the Luxembourg Bank ever had or maintained possession of an indispensable instrument representing AIBC's Swiss Franc time deposit.[13/] Since possession of such a document may be the only means by which a pledge of a time deposit may be perfected, see

Walton v. Piqua State Bank, 204 Kan. 741, 466 P.2d 316 (1970); Restatement of Security, § 1 (1941), the Bank's pledge theory appears unsupportable.

While in this case as distinguished from the facts in other cases, the obligor of the supposedly pledged chose in action, the Luxembourg Bank, had notice of the intended interest of the intended pledgee, the New York Bank,[14] and it may be questioned whether any indispensable instrument was created representing the pledged property, the time deposit, analysis indicates no warrant for a difference in principle here from that in the decided cases. The arrangement employed fails to satisfy the purposes of the delivery requirement of the New York law of pledges even if the indispensable instrument requirement were to be disregarded in this case.

The primary purpose of the requirement that the pledged property be delivered to the pledgee is to provide "notice to the pledgor's creditors ... that the property in question is no longer free from prior interests of third parties." Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 977 (2d Cir. 1945). See In re Merz, 37 F.2d 1, 4 (2d Cir.), cert. denied, 281 U.S. 738 (1930); In re Copeland, 391 F. Supp. 134, 151 (D. Del. 1975) (pledgor must not be permitted to derive a "false credit" from apparent ownership of item pledged). The Luxembourg Bank issued a contract directly to AIBC, dated April 30, 1973, which confirmed the time deposit and stated that AIBC would be entitled to 3,305,997.50 Swiss Francs on November 2, 1973.[15/] The contract makes no reference to any pledge of the deposit to the New York Bank, and the Bank has not offered any evidence to suggest that the contract was subsequently recalled or modified to reflect a pledge. Hence, the defendant permitted the existence of conditions under which the bankrupt could easily make it appear to potential creditors that the Swiss Franc time deposit was an unencumbered asset. Given the existence of the time deposit receipt in the hands of AIBC and the absence of any effort by the New York Bank to prevent third parties from relying on the apparent ownership of the deposit, the defendant Bank's agency relationship with the Luxembourg Bank where the deposit was maintained is insufficient to constitute that delivery and possession of the property which is necessary to render a pledge valid and enforceable.

Regardless of whether a pledge to the New York Bank of the time deposit had been perfected in Luxembourg's hands, however, the assumed pledge expired when the time deposit matured on November 2. The subject of the pledge -- the time deposit -- had simply ceased to exist prior to the loan repayment to the New York Bank.

Moreover, without regard to expiration of the time deposit, the assumed pledge was lost as matter of law when the Swiss Francs were forwarded to the Swiss Bank without any notice of a pledge to the New York Bank. The Swiss Francs were then exchanged into dollars which were transmitted to New York by Swiss Bank.

It is clear that a pledge, once perfected, may be lost where the pledgee or his agent has lost possession of the collateral. McCoy v. American Express Co., supra. The defendant's own theory posits that a pledge may be perfected where the property is in the possession of a third party only where that party has notice of the pledgee's interest. Yet the defendant Bank has presented no evidence to indicate that the Swiss Bank was aware of the purported pledge.[16/] To the contrary, the instructions sent to the Swiss Bank by both AIBC and the Luxembourg Bank show that no reference was made to any interest in the funds by the New York Bank. Thus, whatever validity the pledge may have had while the Luxembourg Bank controlled the property, the pledge ceased to be perfected when the property came into the control of the Swiss Bank.[17/] While the interruption in possession was merely a temporary one, the fact remains that a judgment creditor of AIBC could have foreclosed on the Swiss Francs on November 2 while they were in the custody of the Swiss Bank. Moreover, had AIBC defaulted on its debt to the New York Bank on November 2 by issuing new and different instructions to the Swiss Bank, the defendant would not have had control over any pledged property with which to effect payment of the debt owed it.

2. Assignment of the Time Deposit. The defendant contends that, irrespective of whether there was a valid pledge of the time deposit, the bankrupt had also assigned the deposit to the Bank. There is no question that time deposits, as choses in action, are assignable. N.Y. Gen'l Oblig. Law § 13-101 (McKinney 1964). See Myers v. Albany Savings Bank, 270 App. Div. 466, 60 N.Y.S.2d 477, aff'd 296 N.Y. 562, 68 N.E.2d 866 (1946). A finding that the agreement between AIBC and the New York Bank was an assignment would be more advantageous to the defendant than a finding of the existence of a pledge, on two separate grounds: an assignment would not require that the Bank have notified AIBC's obligor of its status as assignee, and an assignment would not need to have been perfected by possession of the underlying obligation.[18]

However, the contention that there was such an assignment is entirely unsupported in the record before the Court.

The test for the existence of an assignment is considerably more stringent than that for the existence of an agreement to pledge. While an assignment need not be in writing, 3 N.Y. Juris., Assignments § 34, (1958), and need not utilize any particular form or phrase, see Advance Trading Corp. v. Nydegger & Co., 127 N.Y.S.2d 800 (Sup. Ct. 1953); Estate of Palmer, 53 Misc. 2d 217, 278 N.Y.S.2d 352 (Sur. Ct. 1967) (substance, not form of transaction controls), it must have divested the assignor of all right, control and interest in the property assigned, and transferred the same entirely to the assignee. Advance Trading, supra; Smith v. New York, 74 Misc. 2d 723, 344 N.Y.S.2d 799, 801 (Sup. Ct. 1973).

The New York Bank contends that the proper test for the existence of an assignment is whether the obligor (the party indebted to the assignor) would be justified in paying its debt to the person claiming to be the assignee. See Hinkle Iron Co. v. Kohn, 299 N.Y. 179, 128 N.E. 113 (1920); Fairbanks v. Sargent, 117 N.Y. 320, 22 N.E. 1039 (1889); Donovan v. Middlebrook, 95 App. Div. 365, 88 N.Y.S. 607 (1904); Modern Kitchens, Inc. v. Damiano, 51 Misc.2d 264, 273 N.Y.S.2d 151 (Sup. Ct. 1966).

Despite support for this contention in the case law cited, the defendant's formulation provides little assistance to the determination of whether a specific transaction should be deemed an assignment. It is both circular -- an assignment may exist if the obligor is justified in paying the assignee, but the obligor may not be justified in paying unless there exists an assignment -- and insufficiently discriminating. See 3 Williston on Contracts § 428 at 161-62 (3d ed. 1960) (the test posed by Donovan v. Middlebrook is incomplete). Hence, the analysis of whether in the instant case the acts and transactions of the parties gave rise to valid assignments requires a more detailed examination of the applicable law. . .

Preliminarily, it is clear that an agreement between two parties in which the first agrees to pay the amount he owes to the second out of a specific fund does not constitute an assignment of that fund. Williams v. Ingersoll, 89 N.Y. 508 (1882); Donovan v. Middlebrook, supra; Modern Kitchens, Inc. v. Damiano, supra. The theory underlying this principle is that the debtor continues in control of the fund until payment is actually made, and the retention of control over the subject matter is inconsistent with an assignment of it. See Donovan, supra, at 367.

It is equally clear that an instruction by one party to his obligor to pay a second party does not constitute an assignment of that obligation. Such an instruction is a "mere direction, revocable [by the first party] at will." *Schreiber v. Keller Mechanical Engraving Co.*, 57 Misc. 644, 108 N.Y.S. 658 (Sup. Ct. 1908). *See* *Aetna National Bank v. Fourth National Bank*, 46 N.Y. 82, 92 (1871) ("an agreement, upon no new consideration, between debtor and creditor, that the former should pay the amount of his debt to a third person, is not irrevocable by the creditor").

Since an assignment requires a complete divestiture of control, the retained power to revoke precludes the creation of an assignment. *See* *Maloney v. John Hancock Mutual Life Insurance Co.*, 271 F.2d 609, 614 (2d Cir. 1959) (under New York law, valid assignment requires "such a present transfer of title or dominion that the debtor can safely pay the fund to the assignee notwithstanding any protests or orders to the contrary by the assignor"); *Farmers' Loan & Trust Co. v. Winthrop*, 207 App. Div. 356, 362, 202 N.Y.S. 456 (1923), *modified*, 238 N.Y. 477, 144 N.E. 686 (1924), cert. denied, 266 U.S. 633 (1925) ("an equitable assignment does not exist where an assignor retains ... any power to revoke"); In re Knowlton, 208 Misc. 454, 464, 143 N.Y.S.2d 111 (Sur. Ct. 1955).

It is nonetheless true, however, that an instruction to an obligor will constitute an assignment if such an instruction is accompanied by some further manifestation of an intention to assign. Restatement (Second) of Contracts, [Tent. Drafts 1-7] § 157(1), comment a. Thus, where the first party writes a letter to his obligor, ordering him to pay a second party, and the letter (or notice of it) is given to the second party, a valid assignment of the obligation has taken place. It is essential that the order to the obligor direct payment of a specific obligation owed to the first party, and not rely on the general credit of the first party, however.[19/]

While an order directed solely to an obligor does not satisfy the requirement for an assignment of an agreement between assignor and assignee, see Associated Metals & Minerals Corp. v. Isletmeleri, 6 Ill. App. 2d 548, 128 N.E.2d 595, 598 (1955), notice or delivery of the order to the assignee is sufficient to signify the requisite agreement, and the order to the obligor presumably makes of that agreement something more than a mere designation of a fund out of which payment is to be made.[20/]

In sum, an assignment requires an agreement whereby the assignor agrees to transfer presently all right, title and control over the subject matter of the assignment to the assignee. Such an agreement may be manifested by conduct, writing or parol, and in particular it exists where the assignor instructs his obligor to pay the specific fund owing to him to the assignee, and the assignor either delivers that order to the assignee or notifies him of it. No agreement to assign is created, however, by either (1) an agreement between two parties that the first will pay a debt owing to the second out of a specific fund; or (2) a revocable instruction to the obligor to pay the obligation to the would-be assignee.

Applying these principles of law, it is clear that the evidence in the record does not reflect any assignment by AIBC of its Swiss Franc time deposit to the New York Bank. Neither the letters exchanged between AIBC and the defendant on April 30 and May 2, 1973, nor the Advance Account Agreement signed by AIBC, purports to divest the bankrupt of all right, title and control of the time deposit. At most those documents grant a security interest in the deposit to the New York Bank while leaving title in AIBC.[21/]

Furthermore, the instructions AIBC issued to the Luxembourg Bank (by means of a telex from the New York Bank sent at AIBC's request) cannot constitute an assignment of the time deposit to the defendant as an order drawn on the assignor's obligor, for they directed Luxembourg to pay the Swiss Bank at maturity, not the New York Bank. The Swiss Bank in turn was instructed to forward the dollars to the New York Bank for AIBC's account there.[22/] This sequence of revocable instructions may be taken at most to designate the fund out of which AIBC planned to repay the New York Bank, but such a designation does not constitute an assignment of the fund. See Donovan v. Middlebrook, supra.

A thorough discussion of the New York Bank's defense requires that the Court consider the "General Pledge Agreement" which AIBC entered into with the Bank on January 29, 1970, long before the transactions giving rise to the instant litigation. While the defendant does not advert to the 1970 Agreement in connection with its time deposit assignment theory, it appears relevant since in executing it AIBC agreed to "assign, transfer to and pledge with [the New York Bank] ... all money and property ... which shall hereafter be delivered to or come into the possession, custody or control of Bank in any manner...." Nonetheless, even if the Luxembourg Bank's possession of the Swiss Francs is deemed to satisfy the custody requirements of the 1970 Agreement, the resulting assignment automatically terminated when that Bank lost "possession, custody or control" over the funds by transferring them to the Swiss Bank, which had no notice of the defendant's interest.

Finally, the actual conduct of the defendant is inconsistent with the assignment theory it presses here. When the funds were transmitted to it from the Swiss Bank on November 2, the New York Bank credited AIBC's account with the full amount received, and then debited it with the principal and interest due on the May loan. Had there been an assignment of those funds to the Bank, it presumably would have taken the payment directly for itself and credited AIBC's account only with the excess received above the amount assigned to the Bank.

3. Assignment of the Foreign Exchange Contract.

In connection with the loan from defendant, AIBC entered into a foreign exchange contract

with the Swiss Bank by which AIBC was to sell that bank Swiss Francs on November 2, 1973 and receive dollars in return. Wholly apart from its claims in regard to the Luxembourg time deposit, the New York Bank contends that AIBC assigned to the Bank this contract right to receive dollars from the Swiss Bank.[23] As evidence of this purported assignment, the defendant points to certain conclusory trial testimony by the Bank's officers, and to the letter of April 30 sent by AIBC to the Bank outlining the first loan transaction. That document states in relevant part

> We have instructed Swiss Credit Bank to deliver to Wells Fargo Bank International Corp. New York, value November 2, 1973, the sum of US$ 1,042,814.37.

This statement would appear to notify the New York Bank that AIBC had instructed its obligor, the Swiss Bank, to deliver the money due AIBC to the New York Bank. As such, it satisfies one of the elements of an assignment. However, the actual instruction given the Swiss Bank was not sufficient to constitute an assignment in favor of the defendant, for it specified that the funds were not to be paid to the New York Bank, but to AIBC's account there.[24/] Hence, there was no order by one party directing its obligor to pay a second party for the latter's own use; see Brill v. Tuttle, supra. Since there is absolutely no other evidence of an intention by AIBC to divest all its right, title and control over the contract right in favor of the New York Bank, the Bank's contract right assignment theory may not prevail.

Even if the record before the Court had established an assignment of AIBC's contract right to the New York Bank, the defendant's failure to comply with the filing provisions of the New York Uniform Commercial Code governing contract assignments would have rendered the alleged assignment invalid as against the Trustee. The Code is inapplicable to security interests in bank accounts, § 9-104(k), and consequently, would not have applied to a pledge or assignment of the Luxembourg time deposit, if one had been made. However, the Code does govern and applies to assignments of contract rights, §§ 9-102(1)(a), (2).[25]

The April 30 letter allegedly establishing the contract right assignment does not measure up to a security agreement under the U.C. C. since it fails to contain a "description of the collateral" as required by § 9-203(1)(a). Cf. In re Laminated Veneers Co., 471 F.2d 1124, 1125 (2d Cir. 1973). Moreover, the Bank failed to file a financing statement, as required by §§ 9-303, 302(1). Hence, under the Code, the defendant failed to obtain a valid and perfected assignment of contract rights.

The defendant Bank maintains that it was not required to file a financing statement because its assignment fell within the terms of § 9-302(1)(e), which exempts from filing

> an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor.

The Bank had the burden to prove that the exemption of § 9-302(1)(e) was available to it, however, Craig v. Gudim, 488 P.2d 316, 320 (Wyo. 1971); 3 Collier ¶ 60.51A, at 1050.10, and it failed to do so. On the record before the Court, AIBC's total "outstanding accounts or contract rights" at the time the instant assignment was allegedly made were $4,439,300.[26/] The assignment thus transferred just under 20% of the bankrupt's accounts, including the assigned contract right. That would appear to be a "significant part" of its outstanding accounts, especially in view of the high absolute value of the transaction at issue. See 1 P. Coogan, W. Hogan & D. Vagts, Secured Transactions § 10.03[8] at 1087 (rev. ed. 1974) (this filing exemption "is surely not calculated to excuse from compliance with the notice-filing requirement an assignment to a bank of a single large claim simply because it is an isolated assignment"); J. White & R. Summers, Handbook of the UCC, § 23-8 at 808-09 (1972) (certainty renders percentage test preferable to criterion relying on isolatedness of transaction). But see Standard Lumber Co. v. Chamber Frames, Inc., 317 F. Supp. 837, 840 (E.D.

Ark. 1970) (assigned accounts totalling some $3,000, or 16% of outstanding accounts, held not significant part).

Thus, none of the New York Bank's theories establish that the Bank enjoyed any security at all in respect of the first loan with which to insure repayment thereof.

C. Pledge and Assignment: The Second Loan

The second loan extended to AIBC by the New York Bank, and the underlying currency arbitrage transaction between AIBC and the Swiss Bank, followed the same pattern as the first loan transaction. Instead of opening a second six-month Swiss Franc time deposit with the Luxembourg Bank, however, AIBC placed the deposit account with the United California Bank in London (hereafter, the "London Bank"). Furthermore, the text of the documents reflecting the May 17 loan agreement between the bankrupt and the New York Bank differed from that of the May 3 loan, and is even less suggestive that the transaction was secured. Consequently, while the defendant's arguments that the time deposit and the foreign exchange contract right were pledged or assigned to it may be ingenious, they remain unpersuasive.

1. Pledge of the Time Deposit. The Bank's pledge theory is defective, for the evidence in the record reflects neither an intention by AIBC to pledge its Swiss Franc deposit to the New York Bank nor a delivery of the deposit or any document representing it into that Bank's possession.

The document which records the agreement between AIBC and the defendant in regard to the second loan is a letter from the bankrupt to the Bank dated May 15, 1973. Unlike the exchange of letters which gave rise to the first loan, the May 15 letter made no reference to any collateral, nor to any agreement to "lodge" the time deposit with the New York Bank. Instead, it merely outlined the arbitrage transaction for which the borrowed funds were to be employed, and indicated that AIBC had issued instructions to the London Bank and the Swiss Bank which would result in repayment to the New York Bank of the money due on November 19. There was no suggestion that such instructions were irrevocable.

The defendant's internal offering sheet for the second loan also varies from that for the first, since it refers to no collateral and recites merely the existence of the May 15 letter and a promissory note which had not yet been sent.[27] Indeed, the Bank did not obtain a signed promissory note or an advance account agreement prior to forwarding the second million dollars, and apparently did not solicit such documents until months later, on August 3, 1973. Notwithstanding a request to AIBC on that date from the Bank, it appears that no promissory note or advance account agreement was ever executed by AIBC in connection with the second loan. Finally, there is no evidence apart from the written documents to suggest that AIBC and the defendant had agreed orally to secure the loan with a pledge of the London Bank time deposit.

As to the delivery and possession of the time deposit by the New York Bank which is essential to a perfected pledge, the Bank puts forward a rather complicated theory. It does not maintain that the London Bank had notice of its "pledge" or acted as its agent; instead, it contends that the Swiss Bank had constructive possession of the time deposit by virtue of an irrevocable instruction which AIBC gave to the London Bank on July 16, 1973 to forward the Swiss Francs at maturity to the Swiss Bank. The defendant then argues that the Swiss Bank's possession was sufficient to perfect a pledge in favor of the New York Bank on either of two grounds: (1) the Swiss Bank had notice of the "pledge"; or (2) the Swiss Bank was itself a pledgee of the time deposit, and possession by that pledgee operated to perfect a second pledge to the defendant, even where the first pledgee had no notice of the second.

The Bank's theory must fail even if one accepts the validity of each of its elements. The Swiss Bank's "constructive possession" of the time deposit was inadequate to perfect any pledge of that property, whether to the Swiss Bank or the New York Bank, for neither bank took steps to prevent AIBC from being able to represent its London Bank deposit as an unemcumbered asset. To the contrary, the London Bank issued a confirmation of the deposit to the bankrupt, dated May 16, 1973, which nowhere reflected any interest of either bank. As discussed in connection with the first loan, possession of an indispensable instrument representing the time deposit is a prerequisite to the perfection of a pledge of the deposit, at least where such possession is necessary to disable a pledgor from deriving a false credit from apparent ownership of the pledged property.

In any event, there is no evidence in the record which suggests that the Swiss Bank had notice of the alleged pledge by AIBC of the London Bank deposit to the defendant.[28] Contrary to the New York Bank's argument, such notice is essential to the perfection of a pledge even where the property is in the possession of a prior pledgee. In Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 977-78 (2d Cir. 1945), the Second Circuit held that property which has been delivered into the possession of one pledgee may be pledged a second time without delivery to the second pledgee. In deciding that a pledge agreement alone, without delivery, was sufficient to create a valid pledge where the property at issue was already held by a prior pledgee, the Court of Appeals added that "[t]he only additional requirement suggested is that the first pledgee be given notice of such contract...." While that language is more precatory than mandatory, sufficient notice was provided in the case before the appeals court. Any contrary rule would fail to effectuate the primary purpose of the delivery requirement for a valid pledge, for potential creditors, upon inquiry to the first pledgee, would not learn of the interests of other parties in the property. See Robinson v. Exchange National Bank, 31 F. Supp. 350, 351 (N.D. Okl. 1940) (possession by one pledgee perfects interest of second where there is agency relationship between the two parties); In re Chapman, 5 UCC Rep. Serv. 649, 652 (W.D. Mich. 1968) (possession by one secured party under UCC § 9-304(1) also perfects for second since inquiring creditors will learn of all interests in the property).

Consequently, there is no basis for concluding that the New York Bank ever acquired a valid, perfected pledge of AIBC's time deposit at the London Bank.

2. Assignment of the Time Deposit. There is no evidence to support the defendant's contention that AIBC assigned the London Bank time deposit to it. To the contrary, all the facts are entirely inconsistent with the notion that AIBC transferred all right, title and interest in the deposit to the New York Bank.

AIBC instructed the London Bank on May 15, 1973 to pay the value of the time deposit at maturity to the Swiss Bank "in favor of American IBC Corp." Although the New York Bank received a carbon copy of that instruction, the document nowhere directs the London Bank to pay the New York Bank. On July 16, 1973, AIBC mailed "irrevocable instructions" to the London Bank to pay both principal and interest at maturity to the Swiss Bank. No reference appeared to the New York Bank.

While AIBC's irrevocable instruction may have transferred control of the time deposit to the Swiss Bank, it is clear that until that event AIBC retained complete control over the time deposit. After the instruction was issued, no possibility remained that the time deposit might be assigned to the New York Bank by AIBC.

3. Assignment of the Foreign Exchange Contract. The Bank asserts that AIBC's letter of May 15, 1973 to the Bank created an assignment to the Bank of AIBC's right to receive dollars under its second foreign exchange contract with the Swiss Bank. That document does lend some support to the Bank's position, for in it AIBC notified the

New York Bank that it had

> instructed Swiss Credit Bank, Zurich to pay Wells Fargo Bank International Corp. New York the sum of $1,046,895.05 value November 19th, 1973.

As discussed in regard to the first loan transaction, a debt due or payable to the assignor may be assigned by a direction to the debtor to pay the debt to a designee for the latter's own use providing that notice of the direction has been given to the designee by the assignor. To come within this rule it was requisite for AIBC to direct Swiss Bank to pay the New York Bank and for AIBC to notify the New York Bank of the direction. The May 15th letter appears to satisfy such a notice requirement.

The actual instruction AIBC gave to the Swiss Bank, however, belies the existence of an assignment. In its telex of May 15 to the Swiss Bank, its debtor, AIBC wrote

> kindly deliver the countervalue in u.s. funds (1,046,894.05 dollars) to wells fargo bank inter'l corp. in favor of american ibc corp value november 19, 1973 (emphasis added).

It thus appears that the bankrupt merely instructed the Swiss Bank to forward the dollars to its own account at the New York Bank, not to pay the New York Bank.

Consequently, AIBC did not divest itself of control over the dollars and transfer all right and interest in them to the defendant by virtue of either the telex or letter of May 15; it made no assignment.

Moreover, as with the first loan, the subsequent conduct of the defendant is inconsistent with an assignment to it of the foreign exchange contract right. Had there been an assignment, the New York Bank would not have credited AIBC's account with the entire sum that it received on November 19; instead, it would have taken the amount assigned to it directly, and credited any excess to AIBC's account.

Finally, as with the first loan, any assignment of the second foreign exchange contract would have been governed by the New York Uniform Commercial Code.[29/] The New York Bank's failure to obtain a written security agreement describing the collateral, and to file a financing statement putting other creditors on notice of the assignment, thus would deprive it of a valid and perfected interest enforceable against the trustee even if it had been able to establish that an assignment otherwise existed.

Thus, as was the case with the first loan, none of the New York Bank's theories justifies a conclusion that the second loan was in any way secured, or that the transfer which extinguished it occurred, under § 60(a)(2) of the Bankruptcy Act, at any time other than November 19, 1973.

D. Payment of the Bankrupt's Debt by the Swiss Bank: The Second Loan

In outlining the second loan transaction to the New York Bank, AIBC explained in its letter of May 15 that it had instructed the Swiss Bank to forward to the New York Bank the dollars to come due on November 19 under the foreign exchange contract. In August, however, AIBC changed its instructions to the Swiss Bank without informing the New York Bank. AIBC at the time was indebted to the Swiss Bank as a result of transactions wholly unrelated to those at issue in this litigation, and on August 29 AIBC instructed the Swiss Bank to retain the dollars due AIBC for itself (Swiss Bank) and thereby extinguish AIBC's debt to it.[30/] Thus, the funds which AIBC had designated for repayment of the second loan made by the New York Bank were no longer to be available for that purpose. However, the new instructions to Swiss Bank were not followed.

On November 19 the Swiss Bank, through error, forwarded the dollars to AIBC's account at the New York Bank pursuant to the original instructions from AIBC of May 15. The Swiss Bank soon discovered its mistake, and requested a return of the funds from the New York Bank in a series of telexes in early December 1973. The defendant denied that the Swiss Bank had any right to reclaim the dollars, and refused to give them up.[31]

The New York Bank has now seemingly changed its position, and in an attempt to turn AIBC's apparent double-dealing to its advantage, contends in this Court that the dollars it received on November 19 had been assigned to the Swiss Bank, and therefore that the delivery of the dollars was not a transfer to the New York Bank of the property of the bankrupt. The defendant maintains that the transfer of funds from the Swiss Bank to it merely substituted the Swiss Bank for the New York Bank as a claimant in bankruptcy, and thus had no effect on other creditors. See In re Erie Forge & Steel Corp., 456 F.2d 801 (3d Cir. 1972). Since a transaction is preferential only if it transfers the bankrupt's property, the defendant would be immune from the trustee's attack if its contention is correct that the funds it received belonged not to AIBC but to the Swiss Bank. Bankruptcy Act, § 60(a); see Ricotta v. Burns Coal & Building Supply Co., 264 F.2d 749 (2d Cir. 1959) (essence of a preference is depletion of bankrupt's estate available to remaining creditors); La Bour v. Allen, 165 F. Supp. 471, 474 (W.D. Mich. 1958).

The defendant's contention raises the threshold question of the choice-of-law to be applied to determine whether AIBC's telex of August 29 to the Swiss Bank constituted an assignment of the foreign exchange contract right to that bank. Since an independent federal choice-of-law rule is appropriate,[32/] New York's rules are not controlling. Similarly, neither the parties' agreement that New York's substantive law applies to the transactions between AIBC and the New York Bank, nor their initial assumption that New York law is applicable here, is dispositive since this alleged assignment involved AIBC and the Swiss Bank, and the latter is not a party to this action.

An examination of the contacts which the August 29 transaction had with Switzerland and New York, the two jurisdictions whose law is potentially applicable, indicates that Switzerland's interest is the more substantial. While the transaction itself took the form of an international telex, the contract allegedly assigned was to be performed in Switzerland by a Swiss entity, and the assignee was also Swiss; the only contact with New York was the residence of the assignor. Consequently, Swiss law seems appropriate.[33] Cf. In re Circle Trading Corp., 26 F.2d 193 (2d Cir. 1928) (Argentine law determines validity of security interest for preference purposes).

In responding to the Court's post-trial request that the parties brief the assignment issue under Swiss law, the defendant submitted evidence that AIBC had entered into an agreement with the Swiss Bank which provided that all transactions between them would be governed by Swiss law. While this agreement was not introduced in evidence at trial, it appears reliable, and together with the New York Bank's revised conclusion that Swiss law is indeed applicable, reinforces the Court's decision.

It appears that AIBC's August 29 telex to the Swiss Bank does not constitute an assignment under Swiss law, as presented to the Court by the parties.[34]

Accordingly, the New York Bank's argument that the funds it received on November 19 belonged to the Swiss Bank may not be sustained.

The expert opinion of Swiss counsel provided by the defendant declares that the Swiss Bank was entitled both to a lien and a right of set-off on the dollar proceeds of AIBC's foreign exchange contract, and concludes that no third party could have obtained an interest in those dollars superior to that of the Swiss Bank after August 29, 1973. The Swiss Bank's priority as against other creditors of AIBC is not at issue, however; that the Swiss Bank may have had a lien on the funds it forwarded to New York does not mean that those funds ceased to be the property of AIBC.[35] Only an assignment or other transfer of all right, title and interest in the funds to the Swiss Bank could have worked the change in ownership which is crucial to the defendant's theory.

The expert opinion of Swiss counsel submitted by the Trustee concludes that the August 29 telex could not constitute an assignment to the Swiss Bank because it was not signed by the assignor, and because its text did not sufficiently reflect an intention to assign. Since neither of these propositions are controverted in the analysis submitted by the defendant, the Court's conclusion must be that AIBC did not assign the dollars to the Swiss Bank under the law of Switzerland.[36/]

IV. Conclusions

Since none of the defenses offered by the New York Bank can be sustained, the Trustee is entitled to recover the preferential transfers received by the Bank.

It may be true that the two transactions the defendant entered into with the bankrupt appeared riskless, since the risk of fluctuation in the foreign exchange rates in the underlying arbitrage contracts was entirely on the Swiss Bank, not on AIBC, and since the series of instructions (revocable) issued by AIBC enabled the defendant to see in May the source of its eventual repayment in November. Yet in relying on a sequence of executory contracts, the Bank's officers made the mistake of assuming that because a secured transaction is riskless, a seemingly riskless transaction must be secured.

The evidence establishes that the defendant had at most an equitable lien on the funds it eventually received as repayment of the loans; under § 60(a)(6) of the Bankruptcy Act, such liens are not sufficient to withstand the attack of the Trustee where "available means of perfecting legal liens have not been employed." See 3 Collier ¶ 60.49, at 1028-29. The defendant's failure to take the elementary steps which would have entitled it to the status of a secured creditor can only be attributed to its banking practices and procedures.

It is indisputable that the payments to the New York Bank deprived other creditors of significant assets which could otherwise have been equitably distributed, along with the hardships imposed by bankruptcy, among all the bankrupt's unsecured creditors. Accordingly, plaintiff shall recover from defendant each of the sums the latter received on November 2 and 19, 1973, respectively, in payment of defendant's loans to AIBC, with interest and costs, to be calculated and entered by the Clerk, and have execution therefor.

The foregoing shall constitute the Court's findings and conclusions as required by Fed. R. Civ. P. 52(a).

SO ORDERED.

DEC 22 1975

Milton Pollack
U. S. District Judge

FOOTNOTES

1/ The first loan was for $1,000,000 on May 3, 1973 at 8% interest, to be repaid on November 2, 1973. On May 3, AIBC purchased 3,240,000 Swiss Francs from Swiss Credit Bank in Zurich to be sold to it for dollars six months later. In the interval, AIBC opened a time deposit with the Swiss Francs at 4.25% with Wells Fargo Bank in Luxembourg.

The Swiss Franc time deposit matured on November 2, and the resulting 3,309,997.50 Swiss Francs were forwarded to the Swiss Bank for exchange into dollars at an exchange rate, fixed in May, which was more favorable to AIBC than the rate which governed the May exchange into Swiss Francs. The Swiss Bank then forwarded the resulting $1,042,814.37 (retaining an unexpected surplus of 1,147.50 Swiss Francs in AIBC's account with it) to the New York Bank for AIBC's account.

The New York Bank credited AIBC with the transfer and debited AIBC's account for $1,040,666.67, representing the principal and interest due the Bank; AIBC's account retained a profit of $2,147.70 which arose from the differential in the two rates of exchange, as reduced by the differential in the rates of interest it paid for the borrowed funds and received for the time deposit. The May contract placed the risk of fluctuations in the relevant exchange rate in November on the Swiss Bank.

The second transaction followed a similar pattern. AIBC borrowed $1,000,000 at 8.5% interest from the New York Bank on May 17, 1973, due November 19, and purchased 3,130,000 Swiss Francs from the Swiss Bank on the same date. AIBC and the Swiss Bank contracted for an exchange of the Swiss Francs back into dollars on November 19 at a fixed rate, favorable to AIBC. In the interval, AIBC placed the Swiss Francs in a six-month 3.25% time deposit at United California Bank in London. The time deposit matured on November 19, and the London Bank forwarded the resulting 3,183,577.83 Swiss Francs to the Swiss Bank for exchange into $1,046,894.05. The latter sum was then sent to the New York Bank for AIBC's account, which credited AIBC with the transfer and debited AIBC's account

$1,043,916.67 in repayment of the principal and interest due the Bank for the May 17 loan. The remaining $2,977.38 was left in AIBC's New York account as its profit on the transaction.

2/ Apart from the contention raised by the defendant that the repayment of the second loan was made out of funds belonging to the Swiss Bank because of an assignment made to that bank by AIBC in August 1973 (for which see discussion, infra), a question was raised at trial that both of the November payments might have been transfers of the Swiss Bank's property. The Swiss Bank transferred the dollars it sold AIBC in return for the latter's Swiss Francs to the New York Bank in favor of AIBC's account. AIBC also maintained an account with the Swiss Bank; the question arose because the Swiss Bank did not record a debit on AIBC's ledger account with it to reflect the transactions until some time after the events took place. Thus, an examination of the Swiss Bank's books on the date of the payments might suggest it was the Bank's, not the bankrupt's, money which was transferred to New York.

The Swiss Bank's delayed bookkeeping entries should have no effect on the outcome of these proceedings, however. See McKenzie v. Irving Trust Co., 292 N.Y. 347, aff'd, 323 U.S. 365 (1945). A preferential transfer may be "indirect" under § 1(30) of the Bankruptcy Act, and the use of a circuitous arrangement involving a third party to effect a transfer from debtor to creditor does not immunize a payment from attack as a preference. National Bank v. National Herkimer County Bank, 225 U.S. 178, 184 (1912); Smyth v. Kaufman, 114 F.2d 40 (2d Cir. 1940). The payment would be deemed to come from the bankrupt's property even if the Swiss Bank's delayed debiting on AIBC's account renders its transfer of funds to New York a loan by it to the bankrupt. It is true that a loan by a third party to a bankrupt which is paid directly to the bankrupt's creditor is not considered a transfer of the bankrupt's property where the lender designates the recipient of the funds, for in that case the funds have never been even potentially available to other creditors. Where such control by the lender is absent, however, as here, the transfer is deemed to come from the bankrupt's estate. See Smyth v. Kaufman, supra; Grubb v. General Contract Purchase Corp., 94 F.2d

70 (2d Cir. 1938); Inter-State National Bank v. Luther, 221 F.2d 382, 393 (10th Cir. 1955), cert. dismissed, 350 U.S. 944 (1956). Moreover, it is clear that no loan was involved in this case. The Swiss Bank acted merely as a conduit: it took AIBC's Swiss Francs, exchanged them for dollars, and forwarded the result to New York.

3/ Whether or not creditors actually existed who might have obtained such a lien has no bearing on the time the transfer is deemed to occur. Bankruptcy Act, § 60(a)(3), 11 U.S.C. § 96(a)(3) (1970).

4/ These figures appear on the financial analysis performed by the New York Bank's credit officer. The financial statement of AIBC dated May 31, 1972, which the officer made use of, lists a net worth of $167,593.17. This difference has no effect on the instant discussion.

5/ The settlement agreement provided that (1) Lara and Ospina would pay AIBC $1,000,000, of which $100,000 would be in cash and the remainder in a series of promissory notes; (2) AIBC would release Lara and Ospina from a series of promissory notes they had already given AIBC totalling $1,250,000; and (3) AIBC would arrange to have discharged a $3,000,000 debt owed by Lara and Ospina to United Brands, of which AIBC was the guarantor. The settlement envisaged that AIBC would enter into an agreement with United Brands in which the latter would extinguish the debt in exchange for the transfer to it of a complete or partial interest in AIBC's Colombian assets.

The loss of AIBC's Colombian assets would be offset by the discharge of its guarantee of Lara and Ospina's obligation to United Brands; both were carried on AIBC's balance sheet, on opposite sides, at approximately $3,000,000. Hence, the net effect of the settlement on AIBC might have been a loss of $250,000, which was the difference between the value of the promissory notes it was extinguishing and those it was to receive. However, it is not clear whether the existing series of notes totalling $1,250,000 was reflected on AIBC's 1972 financial statement; if it was not, the loss would not necessarily have affected the net worth figure calculated on the basis of that statement. It should be noted that AIBC's president testified at trial that the proposed settlement represented a loss to AIBC of some $2,000,000.

6/ The Bank was instructed in a letter from AIBC dated May 1, 1973 to forward all of the promissory notes which had been deposited with it in escrow to Lara and Ospina 120 days after the deposits were made if AIBC had not succeeded in reaching an agreement with United Brands, as discussed in note 5, supra, before that time expired. The record does not show if the escrow deposits were ever made, so it is difficult to determine the date on which the Bank became aware that the settlement had fallen through. Regardless of the particular date, the defendant's contention that AIBC's continued existence as a corporate entity from May through November compels a finding that the Bank had ceased to have any cause to believe AIBC was insolvent in November is nothing short of frivolous.

The Bank also argues, on the basis of some ambiguous trial testimony of one of its officers, that it had refused to act as AIBC's escrow agent in May, and thus never learned that the settlement agreement failed. Even if the testimony is credited, the Bank may not contend that it was not advised of the terms of the proposed settlement, including its highly contingent nature. The defendant was therefore on notice that AIBC was in an extremely dangerous position -- one which a person of ordinary prudence would deem worthy of additional inquiry in light of AIBC's minimal capitalization.

7/ The Bank maintains that if AIBC lost its assets in Colombia it would also have been discharged from liability on its guarantee of Lara's and Ospina's $3,000,000 debt to United Brands; consequently, there would have been no net effect on AIBC's balance sheet. Yet the liquidation of the United Brands debt -- and AIBC's liability therefor --

was the very point of the contingency written into the settlement agreement, see note 5, supra. Hence the Bank had no reason to assume that the loss of AIBC's assets would necessarily be accompanied by a release of the company's obligation on its guarantee.

8/ The other evidence presented on the question is similarly inconclusive. Nikita Lobanov, another Bank officer, wrote a letter on November 21 to a customer to whom he had previously recommended AIBC's services to explain that AIBC was now in financial difficulty. Boland was unable to account for Lobanov's knowledge of AIBC's condition. While the Lobanov letter suggests that the Bank did know of AIBC's problems on or about the date the second loan was repaid, it is uncontroverted that on November 19 Boland arranged a meeting for Silverston with the Bank officer in charge of Latin American operations to discuss a new transaction AIBC was investigating in the Dominican Republic. This conduct by the defendant Bank seems entirely inconsistent with the proposition that it had actual knowledge of AIBC's insolvency at that time.

9/ The Supreme Court has not decided whether the determination of the state law incorporated by § 60(a)(2) of the Bankruptcy Act is to be made in reliance on the choice-of-law rules of the forum state or in accordance with an independent federal choice-of-law rule. McKenzie v. Irving Trust Co., 323 U.S. 365, 371 n.2 (1945). See generally Klaxon Co. v. Stentor Elec. Mfr. Co., 313 U.S. 487 (1941); De Sylva v. Ballentine, 351 U.S. 570, 581 (1956) (failure to enunciate choice-of-law rule to determine applicable state law incorporated by Copyright Act). As a consequence, the federal courts have adopted a variety of approaches to the problem. Compare Matthews v. James Talcott, Inc., 345 F.2d 374 (7th Cir.), cert. denied, 382 U.S. 837 (1965) (law of state where transfer is made), with Hoppe v. Rittenhouse, 279 F.2d 3, 8 (9th Cir. 1960) (law of state of bankrupt's incorporation and execution of contract). See Speare v. Consol. Assets Corp., 367 F.2d 208, 211 (2d Cir. 1966).

Several commentators have argued in favor of an independent federal choice-of-law rule. See, e.g., Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 808 (1957); Note, Applicability of State Conflicts Rules When Issues of State Law Arise in Federal Question Cases, 68 Harv. L. Rev. 1212, 1220-21 (1955) (trustee's action to avoid preference is federally-created right without state analogue, should not be governed by state conflicts rules).

Since the preference provisions of the Bankruptcy Act may work to disrupt, albeit unintentionally, even bona fide transfers, it appears that the Act would be implemented in a manner most consistent with proper commercial practices if the federal court chooses that body of state law which would have governed the transfer between the creditor and the bankrupt had bankruptcy not intervened, insofar as it may be ascertained. Any other rule might require the parties to a transaction to determine, and comply with, two separate sets of rules: those governing the transaction in the event of bankruptcy, and those applying otherwise. Cf. Austrian v. Williams, 198 F.2d 697, 701-02 (2d Cir.), cert. denied, 344 U.S. 909 (1952); Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 514 (1954).

The Trustee may institute suit for recovery of a preferential transfer in a number of judicial districts. See 3 Collier ¶ 60.60[1.1], at 1105-06. Consequently, the law of the forum state may not always be the one that the parties anticipated would govern their transaction. Thus, the federal courts should not be required to choose the forum state's law in every case; in the instant action, however, it supplies the appropriate rules of decision to assess the transactions between AIBC and the New York Bank.

10/ A document called an "Advance Account Agreement" was also completed in connection with the loan; by executing it AIBC granted a security interest to the Bank "in all documents which come into your [the Bank's] possession ...." (emphasis added). Since the time deposit was not represented by any document other than the receipt of which AIBC retained possession, the Advance Account Agreement has no bearing on the New York Bank's interest in the Luxembourg deposit.

11/ Since the Uniform Commercial Code does not apply to any "transfer in whole or in part of ... any deposit ... maintained with a bank," N.Y. U.C.C. § 9-104(k) (McKinney 1964), the common law of the state is applicable here.

12/ The defendant argues that mere notice to a third party is sufficient to perfect a pledge and that an agency relationship is not required between that party and the pledgee. The Restatement of Security § 8 (1941) supports the Bank's position, as does the analogous provision in the N.Y. U.C.C. § 9-305 (McKinney 1964). The McCoy case required an agency relation where the third party was also an agent of the pledgor. Hence, the case law is unclear whether mere notice may be sufficient for perfection where dual agency is not present. Compare Cornelius v. C.C. Pictures, Inc., 5 F.2d 157 (2d Cir. 1925) (New York law deems mortgagee has possession where bailee has been notified and attorns to mortgagee) with Gins v. Mauser Plumbing Supply Co., 148 F.2d 974, 977 (2d Cir. 1945) (McCoy cited for proposition that pledgee with possession also holds for second pledgee where he is given notice of second pledge). It may be assumed for purposes of this opinion that the necessary relationship is present.

13/ The New York Bank contends that it maintained control of the time deposit equivalent to the possession of such an instrument because the time deposit was negotiated by means of the New York Bank's telex facilities, including the use of its "test key" verifying code. The Bank concludes that AIBC could not communicate with the Luxembourg Bank in regard to the time deposit except by using the telex in the control of the New York Bank. The documentary evidence belies this claim, however; the record includes two examples of mail communication from Luxembourg to AIBC, and one -- a request for confirmation of the time deposit contract mailed earlier -- suggests that an answer by mail was expected. Moreover, the Bank has not established that AIBC could not have obtained the documents or signature cards necessary to obviate the need for the Bank's telex.

The defendant Bank also attempts to circumvent the indispensable instrument requirement by suggesting that the subject of the pledge was the Swiss Francs themselves, not the time deposit. Unless words are not to be taken to mean what they say, however, there is no evidence in the record that AIBC and the New York Bank agreed that the Swiss Francs themselves would be pledged to secure the loan.

14/ Some support for the view that possession of an indispensable instrument may not be necessary to establish control over a time deposit may be derived by analogy from the theory of quasi-in-rem jurisdiction, which is bottomed on a plaintiff's ability to attach a debt by asserting jurisdiction over the person of the party who is indebted to the defendant. See Harris v. Balk, 198 U.S. 215, 222 (1905) ("The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes"). The New York Bank's agency relationship with the Luxembourg Bank, the obligor of the time deposit, may arguably give rise to sufficient control over the obligor to perfect the pledge of the obligation. While this proposition was implicitly rejected in Walton v. Piqua State Bank, supra, (over a strong dissent), where the pledged time deposit was maintained at the very bank to which it had been pledged, Walton is distinguishable in that an indispensable instrument was in existence there, and the pledgee-bank had failed to obtain possession of it. But cf. Craig v. Gudim, 488 P.2d 316 (Wyo. 1971) (maintenance of deposit at creditor-bank does not give bank "possession" of deposit sufficient to satisfy perfection of assignment under U.C.C.).

15/ There is no contention by either side that this contract constituted an indispensable instrument representing the deposit; it need not be so characterized, however, to have been capable of deceiving creditors of AIBC.

16/ The New York Bank does contend that the Swiss Bank had notice of the pledge, but its argument is based exclusively on tenuous inferences. Ironically, the defendant suggests that the Swiss Bank must have known of the pledge because it knew of the New York Bank's loan to AIBC, that AIBC was thinly capitalized, and that "it would be incredible for a bank to lend [AIBC] $1,000,000 on an unsecured basis."

17/ The parties initially addressed this issue under the impression that the Swiss Bank processed the currency exchange on November 2 by contemporaneously debiting and crediting AIBC's account at the Swiss Bank, so that the transaction might be deemed to have returned the pledged property to AIBC, the pledgor. The parties appear to have dropped the issue when further factual analysis revealed that AIBC's account was not involved in the transaction on November 2, see note 2, supra. The legal significance of the matter is derived more from the loss of possession by the New York Bank than from the identity of the party which obtained the property, however; the Court must therefore deal with the issue.

The defendant Bank points to authority which holds that a pledge may be preserved where the pledgee gives up the property to the pledgor for "a temporary or special purpose." Hickok v. Cowperthwait, 210 N.Y. 137, 103 N.E. 1111 (1913). That doctrine is of no avail here since it is based upon an agency relationship between pledgee and pledgor, See Harrison v. Merchants National Bank, 124 F.2d 871 (8th Cir. 1942); Israel v. Woodruff, 299 F. 454 (2d Cir. 1924), and no showing has been made that the Swiss Bank acted as agent for the defendant.

18/ While the Uniform Commercial Code imposes the same perfection requirements on assignments and pledges alike, the New York common law, applicable to this alleged assignment of a bank deposit, does not.

As to the notice requirement, the assignee of a time deposit has a "duty" to notify the bank holding the deposit (the obligor) to protect himself against payment by the bank to the assignor. See Brown v. Empire City Savings Bank, 23 Misc. 2d 1094, 203 N.Y.S.2d 339 (Sup. Ct. 1960). Nevertheless, such notice is not a requirement of a perfected assignment, and it is not a prerequisite for the assignee to be accorded priority against subsequently-attaching creditors of the assignor. County Nat'l Bank v. Inter-County Farmers Coop. Assoc., 65 Misc. 2d 446, 317 N.Y.S.2d 790 (Sup. Ct. 1970).

As to "possession" of the time deposit, a delivery of the property assigned to the assignee is not fundamental to an assignment, though it is to a pledge. See 3 Williston on Contracts § 430 at 172 (3d ed. 1960). See generally 3 N.Y. Juris., Assign. § 36 (1958). Thus the issue of the indispensable instrument doctrine appears irrelevant to the assignment asserted here. This result may be anomalous, for potential creditors of the assignor may be as deceived by an unrecorded or unpossessed assignment as by an undelivered pledge. The New York common law does not require either notice or filing of an assignment, however, and does not appear sensitive to the policy of protecting potential creditors in the assignment context.

19/ See Fischer v. Liberty Nat'l Bank & Trust Co., 53 F.2d 856 (S.D.N.Y. 1931), aff'd, 61 F.2d 757 (2d Cir. 1932), cert. denied, 288 U.S. 611 (1933); United States v. Bush Construction Co., 176 F. Supp. 524, 526 (E.D.N.Y. 1959) (delivery by nonparty to plaintiff of letter addressed to defendant authorizing it to pay funds due non-party to plaintiff constitutes irrevocable assignment); Doyle v. East New York Savings Bank, 44 N.Y.S.2d 318 (Mun. Ct.), aff'd, 44 N.Y.S.2d 328 (Sup. Ct. 1943) (citing Brill

v. Tuttle); Brill v. Tuttle, 81 N.Y. 454 (1880) ("when ... an order is drawn upon a third party and made payable out of a particular fund, then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment pro tanto of the fund"); Lauer v. Dunn, 115 N.Y. 405, 22 N.E. 270 (1889)(same); Seamon v. Federated Films, Inc., 142 N.Y.S.2d 324, 332 (City Ct. 1955) (assignment in form of an irrevocable direction to pay is valid; A.O. Andersen & Co. v. Lamborn, 112 Misc. 235, 184 N.Y.S. 88 (Sup. Ct. 1920); Associated Metals & Minerals Corp. v. Isletmeleri, 6 Ill. App. 2d 548, 128 N.E. 595 (1955); Edmund Wright Ginsberg Corp. v. C.D. Kepner Leather Co., 317 Mass. 581, 59 N.E.2d 253 (1945); 3 Williston on Contracts § 426 (3d ed. 1960) ("An order by the creditor given directly to the debtor requesting him to pay a third person does not in the absence of notice to that person make him an assignee of the claim"); Restatement (Second) of Contracts, supra, § 157(1).

20/ While some of the authority cited in note 19, supra, suggests that the delivery of an order gives rise to an "equitable" assignment, the distinction between legal and equitable assignments would appear inapplicable to the particular transactions before the Court. The defendant's assignment arguments involve alleged assignments to it of (1) AIBC's time deposits of Swiss Francs, and (2) AIBC's right under its foreign exchange contracts with the Swiss Bank to receive dollars on November 2 and 19. Both time deposits, as choses in action, and contract rights may be assigned legally, not merely equitably. This is the case even if the deposit or contract right is to mature or be performed subsequent to the date of the assignment. See Stathos v. Murphy, 26 App. Div.2d 500, 276 N.Y.S.2d 727 (1966), aff'd, 19 N.Y.2d 883, 281 N.Y.S.2d 81 (1967) (assignment of present claim which has not yet matured is nonetheless an assignment of a present interest); Rockmore v. Lehman, 129 F.2d 892 (2d Cir. 1942), cert. denied, 317 U.S. 700 (1943), rev'g on rehearing, 128 F.2d 564 (2d Cir. 1942) (an assignment by one party to an existing bilateral contract of his right to the other party's performance constitutes a present transfer and is therefore enforceable at law, even where the contract is completely executory when assigned).

Although an equitable assignment does not take effect until the assigned funds actually come into existence, a legal assignment is perfected when made (absent statutory requirements, such as filing). Since the assignments asserted by the Bank constitute present transfers, if they exist at all, the timing of perfection of equitable assignments is irrelevant to the issues at hand. The trustee's citation of PPG Industries, Inc. v. Hartford Fire Insurance Co., 384 F. Supp. 91, 95 (S.D.N.Y. 1974) is also inapposite, since that case involved the equitable assignment of a future interest in the proceeds of a claim.

21/ The Bank puts forward the proposition that an agreement to pledge a chose in action automatically constitutes an assignment thereof. There is no foundation for such a view -- no assignment may be enforced unless it satisfies the requisite legal criteria.

22/ The New York Bank instructed the Luxembourg Bank at AIBC's request on May 1, 1973 to pay the time deposit at maturity to the Swiss Bank which then should "credit dollar equivalent 1,042,814.37 to WFBI [the New York Bank] for account American I.B.C." On November 2, 1973, the Luxembourg Bank instructed the Swiss Bank to "remit dollar equivalent to Wells Fargo Bank Int. New York ... in favour of American IBC Corp."

23/ The assignment of a contract right which is to become due in the future nevertheless constitutes a present transfer and is enforceable at law. See note 20, supra.

24/ AIBC telexed the Swiss Bank on April 30, 1973 that on November 2 it should "Kindly arrange delivery of countervalue dlrs 1,042,814.37 to Wells Fargo Bank International Corp. New York value November 2, 1973 reference American IBC Corp." Whatever ambiguity may inhere in the phrase "reference" is resolved by AIBC's use of the same term elsewhere in the telex in a context in which the phrase could only mean "for the account of." Also see note 22, supra.

25/ The defendant argues that the U.C.C. is inapplicable to the assignment because (1) it was itself repayment of AIBC's debt to the New York Bank, not merely security for such repayment; and (2) it falls within the Code's exception under § 9-104(f) for transfers which delegate contract duties as well as assign rights. The defendant's contention may be correct that assignments which are meant to effect payment in themselves and not merely to provide security are not controlled by the U.C.C., see § 1-207(37); Art-Camera-Pix, Inc. v. Cinecom Corp., 64 Misc. 2d 764, 766, 315 N.Y.S.2d 991 (Sup. Ct. 1970). But see J. White & R. Summers, Handbook of the UCC (1972) § 22-8 at 778. Nevertheless, there is no evidence to show that the assignment alleged here was so intended. To the contrary, it stretches credibility to assert that AIBC's debt to the New York Bank on the first loan was extinguished on May 3 by virtue of the contract right assignment; had the defendant not received repayment on November 2, it seems at least as likely that it would have sought payment from AIBC on its promissory note as from the Swiss Bank on the assignment.

The Bank's second contention is similarly devoid of merit. There is nothing in the record to suggest that AIBC delegated to the New York Bank its obligation to perform under the contract by supplying Swiss Francs to the Swiss Bank.

26/ The defendant submitted a figure of some $8.8 million. In arriving at that figure it relied on $3.3 million of foreign exchange contracts AIBC had entered into with the Swiss Bank other than those which involved loans from the New York Bank. The Swiss Bank's statement of AIBC's account with it for the period January 1 through December 4, 1973, which was introduced into evidence, shows the transactions were posted in August 1973. While the contract rights giving rise to the recorded exchanges may have been outstanding in the spring of 1973, the defendant has presented no evidence to that effect and this Court can make no assumptions. The other element in the Bank's calculations involved $5,586,400 for foreign exchange contracts AIBC had entered into with the National Bank of North America; AIBC breached those contracts in July and August 1973, and the figure relied upon by the Bank was the amount AIBC agreed to pay NBNA in settlement. The actual total of contract rights outstanding with NBNA after February 9, 1973, exclusive of the loss NBNA incurred as a result of AIBC's breach in the summer of 1973, was the $4,439,300 discussed above.

27/ An internal report of the New York Bank dated October 19, 1973, outlining both loans, does refer to the London Bank time deposit as collateral for the second loan, but it is not evidence of an agreement with AIBC. Nor is the reference to a pledge of the London Bank deposit in AIBC's own account book dispositive; testimony at trial indicated that the bankrupt's books did not necessarily present either an accurate or contemporaneous record of the transaction.

28/ The Bank argues that such notification may be found "by implication from the surrounding circumstances." It argues that the Swiss Bank's insistence that AIBC make irrevocable its instructions to the London Bank to forward the funds to the Swiss Bank when the time deposit terminated may be understood only if the Swiss Bank was acting on the New York Bank's behalf. It also maintains that the Swiss Bank knew that this second transaction was similar to the first, which involved a pledge; that the Swiss Bank knew the defendant must have had security for its loan; and that the Swiss Bank was aware that the funds had come from the New York Bank, were to return to it, and that the defendant had been given a copy of AIBC's May instructions to the London Bank. These conclusory and conveniently speculative inferences are clearly insufficient to meet the defendant's burden of proof on the issue.

29/ In addition to the arguments it made in regard to the UCC's applicability to the contract right assignment in the first loan transaction, see note 25, supra, the defendant maintains that the assignment of the second foreign exchange contract did not involve a "contract right" as that term is defined in § 9-106. Such a right under the Code is a right to payment "not yet earned by performance". The Bank submits that the irrevocable instruction AIBC issued to the London Bank to forward the Swiss Francs to the Swiss Bank constituted AIBC's performance under its exchange contract with the Swiss Bank, so that the right to the dollars it assigned to the defendant had already been earned. Even if that is a proper analysis, however, the UCC remains applicable. A "contract right" which has been earned by performance constitutes an "account," § 9-106, Official Comment (McKinney 1964), and an assignment of an account is governed by the Code in the same fashion as that of a contract right.

As to the applicability of the UCC's exemption from filing for assignments of insignificant portions of a debtor's outstanding accounts, the assignment of the second foreign exchange contract, in conjunction with the first, gave rise to an assignment to the New York Bank of approximately 32% of AIBC's outstanding contract rights and accounts as of May 1973, on the record before the Court. See note 26, supra.

30/ AIBC's telex of August 29 to the Swiss Bank reads in pertinent part:

> 2) ucb [the London Bank] nov 19 paying you 3,182,557.83 swiss francs representing 3,130,000 principal and 52,557.83 interest.
>
> 3) this sum of 3,182,557.83 sf sold you value 19 nov 1973 per our conversation with mr ribi and second telex of may 15 to mr ribi attn: at rate of 3.04 meaning for dlrs 1,046,394.05.
>
> 4) kindly utilize these dollars to repay all dollar advances (and interest thereon) made to american ibc corp.

31/ The New York Bank telexed the Swiss Bank on December 11, 1973 that:

> these funds were pledged to our bank to secure a loan and upon their receipt were applied to the repayment of that loan. We are of course shocked to hear from you that these same funds were pledged to you and that you feel they were transmitted to us in error. Obviously from our point of view and based on loan documents and pledge agreement in our files the receipt of these funds constituted the final phase of the orderly liquidation of a secured transaction. You will understand that we cannot return these funds.

32/ See note 9, supra.

33/ It is likely that the New York courts would also apply Swiss law to determine if the telex constituted an assignment, especially in light of the agreement regarding the applicable law by the parties to the assignment. See Haag v. Barnes, 9 N.Y.2d 554, 216 N.Y.S.2d 65 (1961); Levey v. Saphier, 370 N.Y.S.2d 808, 813 (Sup. Ct. 1975).

It is true, as the Trustee argues, that the choice-of-law provisions of the New York Uniform Commercial Code appear to make Article 9 of the Code applicable to determine the "validity and perfection of a security interest" arising from an assignment of a contract right where the assignor's record-keeping office is in New York, §§ 9-103(1), 1-105(2) (McKinney 1964). The issue of whether the August 29 telex is an assignment at all, however, is an independent question for which the Code supplies no rule of decision. Hence the New York courts would need to apply some body of law other than the U.C.C. to determine the character of the August 29 telex, and, as shown above, it appears likely that the law applied would be that of Switzerland, not the common law of New York.

It should be noted that the U.C.C.'s choice-of-law rules may be subject to the limitations which are imposed on the applicability of American domestic law to essentially foreign transactions. See generally Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir.), cert. denied, ___ U.S.___ (Dec. 8, 1975); Leasco Data Processing Equipt. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

34/ See Fed. R. Civ. P. 44.1; C. Wright & A. Miller, Federal Practice & Procedure § 2444 (1971).

35/ If, as the defendant's Swiss Counsel suggests, the Swiss Bank acquired an enforceable lien on or before August 29, 1973, and that lien continued in the dollars even after they were forwarded to New York, the funds obtained by the New York Bank, while even on this hypothesis the property of AIBC and not the Swiss Bank, would have been subject to the Swiss Bank's prior interest. Their transfer to the defendant, therefore, would not have depleted the assets of the bankrupt available to its unsecured creditors.

Although all the statutory elements of a preference would still have been present, the depletion which is arguably essential to the Trustee's recovery, see Ricotta v. Burns Coal & Bldg. Supply Co., supra, would not have occurred.

However, whatever lien the Swiss Bank may have had in the dollars by virtue of the general agreement AIBC had entered into with it (and which is relied upon by defendant's Swiss counsel) was lost when the Swiss Bank relinquished the funds; the Swiss Bank did not place the dollars with the New York Bank as an investment of AIBC's funds still on deposit with it.

36/ The result would be similar if New York law were applicable. It is true that the August 29 telex appears to satisfy the criteria of an assignment under the common law rule discussed in connection with the other assignment issues, supra. That rule provides that a direction given by an assignor to a party indebted to it which designates a third person to whom the debtor should pay the debt constitutes an assignment of the debt to the designee, where he is given notice of the direction. See authorities in note 19, supra.

AIBC's August 29 instruction directed the Swiss Bank, indebted to AIBC under the foreign exchange contract, to pay the dollars owed to AIBC to a designeee -- the Swiss Bank. Since that Bank was both AIBC's debtor and designee, the direction to the former automatically met the requirement of notice to the latter.

Nevertheless, it seems likely that this doctrine may not properly be applied to infer the existence of an assignment where both the assignee and the party indebted to the assignor are the same person. There appears to be no authority in the case law to so apply the rule, and a significant distinction may be drawn between the instant case and the more traditional fact pattern. In a case involving three parties, the assignor's intention to assign is manifested by two separate acts: the order to the debtor, and the notice to the assignee. Since an order alone is insufficient to constitute an assignment, because it is revocable, see Aetna National Bank v. Fourth National Bank, supra, the combination of the two acts is essential to manifest the requisite intention.

Although a single act may accomplish the two functions of direction and notice where the identity of the debtor and the assignee is the same it should be as inadequate to manifest an intention to assign the debt as is a single act in the more traditional situation. Otherwise, an instruction which is meant as a "mere direction, revocable .... at will," Schreiber v. Keller Mechanical Engraving Co., supra, may unwittingly be interpreted as an assignment. Hence, it seems prudent to require additional evidence of an intention to create an assignment where there is merely a single act which both instructs a debtor to pay the debt to himself and notifies him of the instruction. No such additional evidence of an intention by AIBC to assign is present in the case at bar.

Finally, this Court need note only briefly that the validity of the August 29 telex under New York law might also be affected by the Uniform Commercial Code, which is potentially applicable. The Code's "statute of frauds," § 9-203, provides that a security interest is valid and enforceable only if the agreement establishing it has been "signed" by the debtor. In the instant case, that requirement may be satisfied only if AIBC's telex "test key" verifying code is deemed equivalent to AIBC's signature under § 1-201(39) of the Code.

The Swiss Bank's failure to comply with the filing requirements of Article 9, if applicable to the transaction, would not be relevant to the instant case, however, since the alleged assignment to the Swiss Bank need not have been perfected prior to November 19 for the funds to be considered the Swiss Bank's property; perfection was accomplished on that date when the Swiss Bank obtained possession of the assigned funds. Compliance with any applicable filing requirements would be relevant if an action were to be brought against the Swiss Bank to recover as a preference the allegedly assigned funds it received on November 19.

The defendant's argument that § 9-104(f) exempts the alleged assignment to the Swiss Bank from the scope of Article 9 is unpersuasive; while that section may literally apply to the instant transaction, it exempts only those contract assignments which, unlike that alleged here, simultaneously delegate the assignor's duty under the contract as well as his rights.

###

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D. OF N. Y.

---x

ALAN B. MILLER, as Trustee in Bankruptcy of AMERICAN IBC CORP., Bankrupt,

Plaintiff,

- against -

WELLS FARGO BANK INTERNATIONAL CORP.,

---x

74 Civ. 3714
(MP)

#76,026

JUDGMENT

This action came on for trial before the Court, Honorable Milton Pollack, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff, ALAN B. MILLER, as Trustee in Bankruptcy of AMERICAN IBC CORP., Bankrupt, recover of the defendant WELLS FARGO BANK INTERNATIONAL CORP. the sum of $2,084,583.34, with interest thereon at the rate of six per cent as provided by law, and the costs of his action.

Dated: New York, New York
January 6, 1976

Milton Pollack
U.S.D.J.

Judgment entered 1-8-76
Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

ALAN B. MILLER, trustee in :
bankruptcy of AMERICAN IDC CORP.,
bankrupt, : 74 Civ. 3714

Plaintiff :

vs. :

WELLS FARGO BANK INTERNATIONA CORP., :

Defendant. :

- x

May 21, 1975,
10 A.M.

Before:

Hon. Milton Pollack,
District Judge.

Appearances:

WEIL, GOTSHAL & MANGES, ESQS.,
Attorneys for Plaintiff,
By: Harvey Miller, Esq.,
Robert Weiner, Esq.,
Fred Leffel, E[illegible].

DUNNINGTON, BARTHOLOW & MILLER, ESQS.,
Attorneys for Defendant,
By: Charles L. Stewart, Esq.,
Gerald E. Ross, Esq.

BEST COPY AVAILABLE

(Case called.)

MR. MILLER: Ready for the plaintiff.

MR. STEWART: Ready, your Honor.

MR. MILLER: I offer these documents, documents 1 through 51 in evidence, your Honor.

MR. STEWART: No objection.

THE COURT: The documents are received subject to rulings on materiality and relevancy which will be made at the close of the evidence.

MR. MILLER: Thank you, your Honor.

If your Honor please, this is an action by a trustee in bankruptcy under Sections A and B of the Bankruptcy Act. It is an action to void a preferential transfer -- in point of fact, your Honor, two transfers which occurred in the month of November, 1973. The aggregate total of the transfers is in excess of $2,000,000, each transfer in principal amount was $1,000,000. Essentially, your Honor, we have a very simple case before the court. In May of 1973 the bankrupt in this case American IBC Corporation negotiated a foreign exchange contract with the Swiss Credit Bank of Zurich. In order to perform under that foreign exchange contract it was necessary for IBC Corporation to borrow moneys to purchase Swiss francs. American IBC Corporation did not have sufficient moneys.

Mr. Silverston, who is the president and chief executive officer of American IBC Corporation, borrowed on behalf of American IBC Corporation $1,000,000 on May 2, 1973, from Wells Fargo International Bank or Wells Fargo Bank International here in New York, the defendant in this action. American IBC Corporation used those moneys to implement and perform the foreign exchange agreement. The Swiss francs which were purchased were then deposited in a time deposit so that they could earn interest for a six-month period so that at maturity American IBC Corporation would have sufficient funds to repay the loan.

The second transaction which occurred on May 17, 1973, your Honor, was essentially the same. It was based upon the fact that Mr. Silverston as the chief executive officer of American IBC Corporation had negotiated another foreign exchange contract with Swiss Credit Bank. So essentially what we have, your Honor, are two loans both of which we contend are unsecured, outstanding for a period of six months. During the six-month period the fortunes of American IBC Corporation deteriorate. At the time the loans were made it was a thinly capitalized corporation with a net worth of less than $200,000. Information comes to the attention of the bank which if it had been pursued would have established beyond doubt that American IBC

Corporation was insolvent. Repayments were made within four months of the filing of the bankruptcy petition. In order to prove the elements of a preferential transfer we have to establish, your Honor, that there has been a transfer of the debtor's property. We submit to your Honor that that is established by the documents which have been put into evidence, specifically the debit advice slips made by the defendant Wells Fargo Bank International to the account of American IBC on November 2, 1973, pursuant to which the bank was repaid $1,000,000 plus interest, the debit slips and monthly statement for the account of American IBC on November 19, 1973, which shows the taking from that account of over $1,000,000 representing principal and interest to repay the bank, the joint findings of fact, number 24, which states that American IBC directed Swiss Credit Bank to remit to its account at Wells Fargo Bank International $1,042,000 and Swiss Credit Bank did so.

Finding number 25: On November 2, 1973, Wells Fargo Bank credited American IBC's account with the $1,042,000. Those are round figures, your Honor.

Finding number 26: The transfer of moneys to the account of American IBC at the Wells Fargo Bank International on November 2nd and the debiting of that account thereafter.

Finding number 50: On November 19, 1973, Swiss Credit Bank remitted $1,046,000 to Wells Fargo Bank International for the account of American IBC.

Finding number 53: Wells Fargo Bank International credited the $1,046,000 to the account of American IBC and thereafter debited that account to effect repayment of the principal and interest on the unsecured loan.

Finding number 54: The transfer of the funds to American IBC's account at Wells Fargo Bank International on November 19, 1973, and the debiting thereof by Wells Fargo Bank International constituted repayment of the outstanding debt from American IBC to Wells Fargo Bank International.

The affidavit of Mr. Luis De Goya, which has been moved into evidence, your Honor, which states the time the money was received and credited to the account of American IBC on November 19, 1973, and when the bank effected a debit. So we submit to your Honor on the basis of the stipulated findings of fact, on the basis of the documents which are now in evidence we have established that there has been a transfer of the debtor's property which establishes one, a transfer and, two, the fact that there has been property of American IBC which was transferred.

Element number 3, that the transfer had occurred at a time when IBC was insolvent. We have submitted today, your Honor, a stipulation between the parties dated May 20, 1971, pursuant to which the parties have stipulated that American IBC Corporation was insolvent on June 1, 1973, and thereafter. So we have established three elements. The transfer was for the benefit of Wells Fargo Bank International as a creditor of American IBC, the answer interposed by Wells Fargo Bank International in response to paragraph 7 and 13 of the complaint admits that it entered into transactions with American IBC on or about May 2, 1973, and May 17, 1973, respectively pursuant to which American IBC borrowed on each date $1,000,000.

Element number 5: That the repayments were in satisfaction of an antecedent debt owed by American IBC to Wells Fargo Bank International.

Finding number 13: It states that Wells Fargo Bank International agreed to lend American IBC $1,000,000 on May 2, 1973.

Finding number 25 states that Wells Fargo Bank International received for the account of American IBC $1,042,000 on November 2, 1973, and credited the same to the account of American IBC and thereafter debited that account to effect repayment.

Finding number 26: The transfer of the moneys to the account of American IBC with Wells Fargo Bank International on November 2, 1973, and a subsequent debiting of that account constituted repayment of the outstanding debt of American IBC to Wells Fargo Bank International.

Finding number 32: On May 17, 1973, American IBC borrowed $1,000,000 from Wells Fargo Bank International to be repaid on November 19, 1973.

Finding number 53: During the afternoon of November 19, 1973, Wells Fargo Bank International credited to the account of American IBC $1,046,000 and thereafter debited that account for the principal sum of $1,000,000 plus interest in repayment of the principal and interest due to Wells Fargo Bank International.

Finding number 54: The transfer of the funds to the account of American IBC with Wells Fargo Bank International and the subsequent debiting of that account by Wells Fargo Bank International constituted repayment of the debt of American IBC to Wells Fargo Bank International.

In addition, the answer interposed in response to the allegations and averments set forth in paragraphs 8 and 14 of the complaint admits that there was paid to Wells Fargo Bank the sums of $1,042,000 and $1,046,000 on November 2, 1973, and November 19, 1973.

In addition, there is in evidence the monthly bank statement covering the month of November, the loan agreements dated May 2, 1973, and May 15, 1973, and the debit and credit slips for the two repayments made in November. So we submit to your Honor we have satisfied the element that the repayments were made in satisfaction of an antecedent debt.

Element number 6: That the repayments were made and the transfers occurred within four months of the bankruptcy of American IBC.

Finding number 95 states that the payment on November 2, 1973, as described in the other findings of fact and the payment made on November 19, 1973, which together aggregate almost $2,100,000 were made within four months of the filing of the petition in bankruptcy against American IBC Corporation.

Element number 7: The repayment resulted and had the effect that Wells Fargo Bank International received a greater percentage of its debt than another creditor of the same class.

We have stipulated, your Honor, that American IBC Corporation was insolvent on June 1, 1973, and thereafter. Insolvency necessarily means in the bankruptcy sense, as that stipulation so provides, that the liabilities of American IBC Corp. exceeded its assets.

We further note that the claims on file in the Bankruptcy Court, claims which will be introduced into evidence establish that the estate possesses insufficient assets to pay the claims of creditors of the same class as Wells Fargo Bank International.

In connection with the first loan transaction we submit to your Honor that the transaction--as to both transactions let me say, your Honor, what happened here was that American IBC gave to Wells Fargo Bank International an executory promise to pay back to Wells Fargo Bank International in six months the amount of the loans and because the bank was able to trace on paper where the moneys were to go and reasonably expected that American IBC would continue to do business with Wells Fargo Bank accepted the executory promise of American IBC Corp.

So we submit to your Honor that we have established by the documentary evidence, by the findings of fact that Wells Fargo International has received a greater percentage of its debt than another creditor of the same class.

The eighth element and final element, that Wells Fargo Bank International had reasonable cause to believe that American IBC was insolvent at the time of the repayment on November 2, 1973, and the repayment on November 19, 1973. We have not reached an agreement on those facts, your Honor.

We would submit that on the basis of the findings of fact and the testimony which will be adduced here today and the evidence before the court that we will establish that Wells Fargo Bank International had reasonable cause to believe, and if they had pursued the red flags which were presented to them, that they would have ascertained, that it would have ascertained, that American IBC Corp. was insolvent and they should have known that, your Honor.

Upon proving those elements, your Honor, we submit to you that there have been two preferential transfers here and that those transfers are voidable and recoverable by the trustee in bankruptcy.

Thank you, your Honor.

THE COURT: Thank you, Mr. Miller.

MR. STEWART: If your Honor please,.this case represents the exact opposite of the classical fact pattern involving voidable preferences. In a typical case a borrower realizing that he is going bankrupt takes whatever remaining assets he has and pays off his loan to his favorite friend, the banker, or factor. Assume this occurs within four months of the filing of the bankruptcy petition, his banker friend knows he is insolvent as he tells them he is insolvent when he repays the loan. And the banker is delighted to be repaid because otherwise he would receive the same treatment as the other general creditors of the bankrupt estate. With this classical pattern you have the elements which will enable the bankruptcy trustee to set aside the transfers of voidable preference.

In this situation we have the exact opposite of the classical fact pattern. The two tranactions were secured, self-liquidating loans obtained by American IBC to finish two currency arbitrage transactions. The loans were designed to unwind automatically. After the two transactions were established in May of 1973 American IBC needed to do nothing further. Neither did Wells Fargo need to do anything further. The banks involved in the transaction merely had to follow the original instructions. The loans would be repaid with interest and American IBC would make a profit. Far from trying to prefer Wells Fargo, American IBC did whatever it could to divert the bank's collateral in the second transaction.

Sheldon Silverston, the president of American IBC, wrongfully assigned the bank's time deposit with United California Bank to Swiss Credit Bank in July and August of 1973. The purpose of this assignment to Swiss Credit Bank was to repay Swiss Credit Bank for the advances it had made to American IBC which Sheldon Silverston had personally guaranteed. His obvious motive in converting the bank's collateral in the second transaction was to relieve himself of personal liability to Swiss Credit Bank. For some reason, which is still unclear, involving the in-house procedures of Swiss Credit Bank, when the time deposit matured on November 19, 1973, Swiss Credit Bank did not follow the second set of instructions in the assignment of the time deposit to it by American IBC. When the funds or when the time deposit matured instead of following the second set of instructions it followed the first set of instructions and paid the money to Wells Fargo.

So that in spite of Sheldon Silverston's efforts the second transaction unwound automatically and Wells Fargo was repaid by dumb luck and not any effort on the part of the borrower to prefer any particular creditor.

With this set of facts it shouldn't make any difference as to what the bank knew or didn't know with respect to the insolvency of American IBC at the time the loan was repaid. The fact of the matter is, however, that the bank was totally unaware of Sheldon Silverston's assignment of the bank's collateral to Swiss Credit Bank.

The second loan was repaid at 11:22 A.M. on November 19, 1973. At the time the loan was repaid the bank was totally unaware that American IBC was insolvent and neither did the bank have any reason to believe that

American IBC was insolvent. Since all the loans to American IBC had been repaid or were shortly to be repaid Mr. Boland, vice president of Wells Fargo, who is in charge of American IBC's account wanted to do further business with American IBC and since the loans were repaid the bank's lending limit to American IBC as a customer was no longer applicable.

On November 19th Mr. Boland met Mr. Silverston at noon at the Bankers Club here in New York for lunch. At their lunch Mr. Silverston proposed a new transaction which he wished the bank to finance, the sale of Yugoslavian motorcylces to the police force in the Dominican Republic.

According to Wells Fargo's in-house procedures the Dominican Republic lay outside of Mr. Bolan's jurisdiction and fell in the Latin American area. Mr. Robert Vanveerson at the bank, in charge of the Latin American area, and Mr. Boland arranged a second meeting for Sheldon Silverston with Mr. Vanveerson the next day on November 20th.

Mr. Silverston came to the bank on the 20th and asked for Mr. Boland. While Mr. Silverston was in the waiting room, waiting for Mr. Boland, Mr. Lobonov met Mr. Boland in the waiting room. Some three weeks before Mr. Lobonov had recommended Mr. Silverston to one of the bank's customers, Sunkist Growers, as a person who would be helpful to Sunkist in effecting switch transactions. Switch transactions in the sense of freeing up block currencies in the eastern European nations. When Mr. Lobonov saw Mr. Silverston in the waiting room he asked him why he had not followed through with Sunkist and Mr. Silverston answered that he was having problems in Colombia and was not able to do so.

Again on November 20th Mr. Silverston went to lunch with Mr. Vanveerson where he proposed that the bank finance the sale of Yugoslavian motorcycles to the Dominican Republic. Thereafter some days later Mr. Vanveerson called Mr. Silverston and rejected the transaction not because of the financial condition of American IBC but for totally unrelated reasons.

The next thing that happened was that Wells Fargo received a telex on December 5, 1973, from Swiss Credit Bank. Swiss Credit Bank demanded the return of the funds to it and claimed that they had been assigned by American IBC. They also stated that they had sent these funds to Wells Fargo by mistake.

After the telex was received Mr. Boland called Mr. Silverston and asked him what the meeting was of the telex from Swiss Credit Bank. Mr. Silverston assured him that he had not pledged Wells Fargo's collateral to Swiss

Credit Bank, that he had pledged other collateral to Swiss Credit Bank and that Swiss Credit Bank was mistaken. Thereafter there followed an exchange of telexes and letters between Swiss Credit Bank and Wells Fargo. Mr. Lilien, who is in charge of Wells Fargo International, called Mr. Silverston. Mr. Silverston gave the same answer, that he had not assigned Wells Fargo's collateral to Swiss Credit Bank and that Swiss Credit Bank was mistaken.

Only after Swiss Credit Bank forwarded the assignment documents to Wells Fargo did Mr. Lilien realize that American IBC was in financial difficulty. On December 11, 1973, he issued a memorandum to the officers of the bank advising that American IBC was in financial difficulty and that no one at Wells Fargo should enter into any further transactions with American IBC or Mr. Silverston.

Thank you, your Honor.

THE COURT: We have the joint findings of fact and the possible amendment of those joint findings that ought to be introduced into the record.

MR. MILLER: If your Honor please, we received a copy of Mr. Stewart's letter yesterday afternoon and we object to any amendment to the joint findings of fact. Indeed as to page 2 of Mr. Stewart's letter I am confident-- or Mr. Ross' letter, I'm sorry -- I am glad to find out that he now realizes that the inferences to be drawn from the findings of fact comply with the applicable law. In any event, these findings of fact were agreed upon in February of 1975. On the eve of trial to come in and attempt to change the findings of fact because they finally realize what inferences the trier of facts may draw from those findings of fact I think is highly improper, as was the service of a brief not authorized by the court to be served on last Friday.

THE COURT: I am interested in what the actual facts are and I know that you are not interested in taking advantage of oversights or errors.

MR. MILLER: I don't purport to do that, your Honor. I am opposed to quoting a portion of the telex. The telex is in evidence and I know your Honor will compare the telex to the finding of fact.

THE COURT: Right.

The first order of business is for you to offer the first findings of fact in evidence.

MR. MILLER: I so offer.

THE COURT: They may be marked as the next exhibit in evidence. That will be Exhibit 62.

Mr. Stewart, I have before me Mr. Ross' letter. In the event that in fact there are technical inaccuracies in the joint findings of fact, Exhibit 52, are they of a kind that would appear to be inaccuracies from the exhibits referred to or do they go beyond the quotation of exhibits?

MR. STEWART: No, sir, I think it would be apparent by referring to the actual exhibits that some of the joint findings of fact are technically inaccurate. The purpose of this letter--

THE COURT: Is that the only purpose of the letter?

MR. STEWART: Yes, sir.

THE COURT: In other words, what you are telling me in effect is the joint findings of fact stands subject to the original evidence referred to therein?

MR. STEWART: Yes, sir.

THE COURT: All right. That takes care of that.

The parties have further stipulated that no issue remains to be tried with respect to the bankrupts and the signed stipulation to that effect will be received in evidence as Exhibit 53, it being conceded that American IBC's liabilities exceeded its assets as of June 1, 1973, and all times thereafter.

I shall expect to know what the fact is with respect to May 1, 1973, as well some time during the course of the trial.

You may proceed.

MR. MILLER: Mr. Silverston.

SHELDON SILVERSTON, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Silverston, in May of 1973 what was your occupation?

A I was president of American IBC Corp.

Q What was the business of American IBC Corp.?

A We engaged in Swiss trade, barter trades and financial actions and from time to time tried to export or import commodities.

Q Were you the chief executive officer of the company?

A Yes, I was.

Q Mr. Silverston, did there come a time that you negotiated a foreign exchange contract with the Swiss Credit Bank?

A Yes.

Q When did that happen?

A During May of 1973.

Q Tell the court the circumstances of that negotiation.

A I phoned Swiss Credit in Zurich and I asked for their spot rates for the purchase of Swiss francs against dollars and their six-month rate for the purchase of dollars against Swiss francs.

Q When did that occur, sir?

A In early May of 1973.

Q Did you reach an agreement with the Swiss Credit Bank?

A Yes, we reached an agreement.

Q Was that reduced to writing?

A I subsequently confirmed it by telex, I believe.

MR. MILLER: I will leave the exhibits in the folder because that is what has been marked on the outside.

Q I show you Exhibits 38 and 39. Would you look at those please.

Those are documents pertaining to one of the foreign exchange agreements?

A Yes.

Q Can you tell us which one that was?

THE COURT: Just a minute.

My index of Exhibit 38 is a report of entertainment and business development and miscellaneous out-of-pocket expenses.

MR. MILLER: That is incorrect. If you will look at 45 and 46, your Honor, they have been renumbered.

THE COURT: All right.

Go ahead.

A Those documents refer to a mid-May transaction, about 15 May value.

Q Was there a prior transaction?

A Yes.

Q When did that occur?

A Early May, approximately 3 May.

Q What was the substance of that transaction?

A The foreign exchange contract we purchased Swiss francs, I think valued 3 May 1973 from Swiss Credit Bank.

Q Of what dollar value?

A Approximately $1,000,000.

Q Did American IDC Corp. in early May of 1973 or April of 1973 have sufficient funds or assets to pay approximately $1,000,000 for the purchase of Swiss francs?

A No, we did not.

Q How did you accomplish or from what source did you obtain the moneys?

A We borrowed the moneys from Wells Fargo Bank International.

Q Did you meet with somebody at Wells Fargo International?

A I spoke with them by telephone.

Q When did that occur, sir?

A The end of April. I believe in context I had spoken to them about the concept toward the end of April and first it would be April 30th or the first of May that we arranged the borrowing.

Q Who did you speak with?

A Mr. Boland.

Q Who is Mr. Boland?

A Vice president of Wells Fargo Bank International and the account officer of American IBC.

Q You had done business with Mr. Boland representing the Wells Fargo Bank International before?

A Yes, we generally -- yes, we spoke primarily with Mr. Boland.

Q And you called Mr. Boland by telephone?

A Yes, I did.

Q And that was during the end of April?

A Approximately that time.

Q What did you say to Mr. Boland?

A I described what we wanted to do on this transaction, told him how the entire transaction would work and asked if Wells Fargo would be interested.

THE COURT: What did you tell him?

THE WITNESS: I told him that we wanted to borrow

$1,000,000 at an interest rate, at that time of no more than 8 per cent provided we got sufficient interest on Swiss francs and we could sell the Swiss francs forward for a sufficient enough premium to earn a deposit and with the market fluctuating daily, the foreign exchange markets fluctuating daily, we would like to do this type of transaction and have it lined up with him so that when the forward premium and the interest rates matched we could enter into it promptly.

THE COURT: Is that the total description you gave to him of the transaction?

THE WITNESS: No, your Honor. I believe, if I can think back to the actual words to him as far as I can recall a year and a half, two years later, I said we had found an interesting way of making some money. If the spread between Swiss franc interest rates and dollar interest rates is not more than 4 per cent and the premium on six-month Swiss francs is 2 per cent or slightly larger we can earn money by borrowing dollars, buying Swiss francs, selling the Swiss francs plus the interest earned on the Swiss francs in the future market, rebuying dollars at that point and the total number of dollars earned would exceed the dollars borrowed and interest thereon.

THE COURT: Is that everything you told him?

THE WITNESS: I discussed the general concept of the transaction with him.

THE COURT: I am trying to find out just what it is that you told him about the transaction and about American IBC.

THE WITNESS: I didn't tell him very much at that point about American IBC. He knew us very well, your Honor.

THE COURT: Had you ever had a transaction of this kind before with Wells Fargo?

THE WITNESS: No, your Honor.

THE COURT: Was the conversation as brief as the way you have just related it to me?

THE WITNESS: No. I think Mr. Boland asked me to summarize it in a letter and please keep the leter as short as possible and crystal clear, which I believe I did.

THE COURT: What is the document number of that?

MR. MILLER: Exhibit 1, your Honor.

Q The letter you just referred to, I show you Exhibit 1, is that a copy of that letter that you wrote to Mr. Boland?

A This is a copy of the letter I wrote to Mr. Boland when he agreed that this concept was a good concept.

THE COURT: Is that the letter you wrote to him to describe what you have been telling him on the telephone?

THE WITNESS: No, your Honor.

THE COURT: Was there another letter?

THE WITNESS: I believe there was, your Honor. I don't have any files.

Q What is Exhibit 1, Mr. Silverston?

A This is the confirmation of the transaction. When Mr. Boland told us that we could go ahead, we went ahead and booked the transaction as described and he asked me to confirm it to him in writing and we confirmed it in writing.

THE COURT: Was there a prior letter that you sent to him?

THE WITNESS: I believe there was or might have been. I don't really recall the entire thing on the telephone. It is really difficult to recollect.

THE COURT: Let me see this letter.

MR. MILLER: I might state that we have asked the defendant to produce all of its records and we do not find any such letter or no such letter has been produced.

THE COURT: Has the trustee produced all the records of American IBC?

MR. MILLER: Yes, your Honor, all the records that the trustee took possession of that were in the premises at tho time of his appointment and qualifications.

THE COURT: The president of the corporation says that he wrote an earlier letter, earlier than April 30, 1973. There should be a copy of it in the files of the trustee.

THE WITNESS: I believe I wrote such a letter, your Honor. I can't guarantee that I did.

THE COURT: This letter of April 30, 1973, on its face seems to indicate something preceded it. It says "We confirm to you our borrowing" so something must have preceded it.

THE WITNESS: I talked with Mr. Boland by telephone and I had described this concept to him. He understood it quite well. The form he understood quite well and he told me he would get back to me. As I said before, your Honor, before we could step forward with the transaction we had to wait for the rates and the forward premium on Swiss francs to match. So it could have been three or four days, it could have been a week or more prior to implementing a transaction such as this because the rates moved every hour.

THE COURT: Did you indicate to Mr. Boland at the time what the prospective profit would be to American IBC on this $1,000,000 transaction?

THE WITNESS: I believe I did. He certainly could figure it out for himself.

THE COURT: What did you tell him?

THE WITNESS: Approximately $2,500.

THE COURT: Did you tell him it was a riskless transaction or relatively riskless?

THE WITNESS: Yes, I told him it was a safe transaction.

THE COURT: Safe from whose viewpoint?

THE WITNESS: From my viewpoint it was perfectly safe.

THE COURT: Safe as to whom?

THE WITNESS: That we could not lose money on this transaction.

THE COURT: Did you tell Wells Fargo that they could not lose money on the transaction?

THE WITNESS: I don't recall. I don't believe I indicated that they would lose money on the transaction or that they were taking any risks.

THE COURT: What risks did you outline in the transaction, if any?

THE WITNESS: I didn't outline any risks in the transaction.

MR. MILLER: If your Honor please, I would show to the court Exhibit 2 in evidence which is a response from Mr. Boland and I call your Honor's attention to the first paragraph which I think demonstrates that there was not a prior letter but rather a telephone conversation.

THE COURT: That confirms a telephone conversation of April 30th but this witness says that he had a preliminary conversation about a week earlier or so in which the nature of a prospective transaction was indicated and that he followed exchange values for a period of time before it was buttoned up into a firm transaction. So the fact that there was a telephone conversation of April 30th does not preclude the witness' assertion that there was an earlier conversation also.

MR. MILLER: I don't dispute that at all, your Honor. I merely submit to your Honor that there was a letter and the original certainly should be in the bank's files.

THE COURT: It should be in the trustee's files.

MR. MILLER: Unfortunately when you take over a bankrupt estate sometimes you don't get everything.

THE WITNESS: If your Honor please, the previous conversation could have been anywhere from two days to a week because it would normally take them some time to come back with an answer to us.

THE COURT: All right.

Q Did Wells Fargo Bank International advance the $1,000,000 to American IBC Corp.?

A Yes, they did.

Q Were those moneys utilized by you to purchase Swiss francs?

A Yes, they were.

Q From whom did you purchase the Swiss francs?

A Swiss Credit Bank Zurich.

Q By the way, Mr. Silverston, what is your educational background?

A I am an economist. I do not have a Mastor's degree.

Q How long were you president of American IBC Corp.?

A From the inception in May of 1969 until the end.

Q American IBC Corp. received an exchange value of the $1,000,000 Swiss francs that is?

A Correct.

Q What was done with the Swiss francs?

A The Swiss francs were placed on time deposit.

Q With whom?

A Wells Fargo Bank Luxembourg.

Q Will you tell us the circumstances under which American IBC Corp. made an agreement with Wells Fargo Luxembourg to deposit the money for a fixed term?

A Wells Fargo New York when we were negotiating this, Mr. Boland asked me if we could place the funds on deposit with Wells Luxembourg and I said, yes, if the rates that Wells Luxembourg pay are equal to the rates we are getting from other people why not. When we were negotiating the time account rates Wells Luxembourg was slightly below some of the other banks and I told this to Mr. Boland and he met the rate.

Q Had you checked with other banks as to what their rates were?

A Yes, I had.

Q Who suggested Wells Fargo Luxembourg?

A Wells Fargo New York. Mr. Boland did.

Q Wells Fargo Bank International?

A Yes.

Q Wells Fargo Luxembourg, do you know whether that is a separate corporation or a division of Wells Fargo Bank?

A It is my impression or I believe, I thought at the time that it was either a subsidiary of Wells Fargo or a branch of Wells Fargo San Francisco.

Q Is it fair to say that you negotiated the rate of return on the time deposit with Wells Fargo Luxembourg?

A Well, I negotiated it. I would not make the time deposit with them unless they made the other rates. I don't believe I spoke with Wells Fargo Luxembourg directly at the time.

Q In other words, you could have made the time deposit on another bank?

A Yes.

Q On behalf of American IBC Corp.?

A Yes.

Q Did you enter into an agreement with Wells Fargo Luxembourg?

A We received a time account receipt from them.

Q I show you Exhibit 3 and ask you whether that is a copy of the agreement or receipt, as you call it.

A Yes, the contract numbered under the time account receipt.

Q It bares a contract number?

A Yes.

Q What is the contract number?

A 42781.

Q Mr. Silverston, when you received Exhibit 3, contract number 42781, did that remain in the possession of American IBC Corp.?

A Yes, it did.

Q You kept it in your personal possession?

A I kept it in the possession of the corporation.

Q What was the term of the time deposit?

A 183 days.

Q Did you give any instructions to Wells Fargo Luxembourg in connection with that time deposit as to disposition of the proceeds on maturity?

A Well, we asked Mr. Boland to instruct Wells Fargo Luxembourg for us at maturity to pay the francs to Swiss Credit Bank Zurich.

Q To your account, to the account of American IBC?

A Yes.

Q What did you ask Mr. Boland --

THE COURT: That is one of the issues involved. Please don't lead the witness on that score.

MR. MILLER: I'm sorry, your Honor.

THE COURT: Have you a record of what you actually told the Swiss bank?

THE WITNESS: The Swiss Bank?

THE COURT: The Luxembourg bank.

THE WITNESS: I believe it is in the slip.

MR. MILLER: I will refer your Honor to the exhibit.

THE WITNESS: In this letter of April 30 "We asked you to instruct Wells Fargo Luxembourg for us to deliver this sum through Swiss Bank Corp. Zurich to Swiss Credit Bank

Zurich in favor of American IBC Corp., attention Mr. Ribi."

MR. STEWART: If your Honor please, that was not the actual agreement that was reached.

THE COURT: I understand.

MR. MILLER: If your Honor would refer to Exhibit 46 which is a telex from Mr. Boland to Wells Fargo Luxembourg which states at the bottom "The Swiss francs, 3,308,850 credit dollar equivalent" -- the second paragraph, "Swiss francs will be credited to your account at Swiss Bank Corp. Zurich, by order Swiss Credit Bank Zurich, by order of American IBC."

THE COURT: I don't know what you are reading from.

MR. MILLER: Exhibit 46, your Honor.

THE COURT: Is this Exhibit 46?

MR. MILLER: It is a copy of a telex, your Honor.

THE COURT: This says the Swiss francs will be credited to the account of Wells Fargo Bank Luxembourg.

MR. MILLER: Yes.

THE COURT: At the Swiss Bank Corporation.

MR. MILLER: Not Swiss Credit Bank, Swiss Bank Corp.

THE COURT: I understand that.

Q Mr. Silverston, why did you instruct Mr. Boland to make that request?

A We had no means of communicating with Wells Fargo Luxembourg other than by letter with verified signatures. We had no test key with them so we asked Wells Fargo New York to do it.

Q When you say Wells Fargo New York you are talking about Wells Fargo International?

A Yes.

Q Wells Fargo Bank International had a test key?

A Yes.

Q What is a test key?

A A test key is a document which yields a number. It is derived by a separate number being assigned for each total sum of figures, an additional number being assigned for the day of the month, an additional number for the day of the week, an additional number for the ordinal number of the message sent that day and a fixed key between the two parties. So that when an amount is sent telegraphicall or communicated between two parties it can be verified by each party having a copy of the key and generally the beginning of the message it will be a test with a number and then you take the total sum added together with the time and days of the week and if it equals that it is verification that it has come from the party who is supposed to be sending it. We had no such key at Wells Fargo Luxembourg.

Q Mr. Boland was offering you the convenience of his bank's test key?

A I don't know if he offered. I asked him to do it.

Q And he acceded to your request?

A Yes.

Q Mr. Silverston, was there a subsequent transaction similar to the one of May 2, 1973?

A Yes, therewas one about May 15th or May 17th.

Q I show you Exhibits 10, 11 and 12. Can you tell us what those exhibits represent?

A Exhibit 10 represents a purchase of Swiss francs from Swiss Credit Bank with instructions of where they are to deliver the Swiss francs and how they are getting paid for the Swiss francs. Exhibit number 11 represents a sale of future Swiss francs to Swiss Credit Bank for dollars telling them where they were going to get the Swiss francs from and where to deliver the dollars. Exhibit 12 is confirmation to the United California Bank in London of placing a time deposit with them of 3,130,000 Swiss francs value May 17th to November 19th at 3-1/4 per cent per annum on the 360-day basis. Together with instructions of where they should remit the francs on maturity.

Q In connection with the transaction represented by those three exhibits, did you borrow any funds from

Wells Fargo Bank International?

A Yes, I borrowed $1,000,000.

Q I show you Exhibit 9. Tell us what that document is.

A A letter I wrote to Wells Fargo Bank confirming the borrowing from them in accordance with a conversation of $1,000,000 for 186 days at 8-1/2 per cent for 360 days giving them instructions on where to deliver the dollars. And giving them information on what I was doing with the funds.

Q Did American IBC Corp. receive the $1,000,000 on May 17, '73?

A Yes, we did.

Q What did American IBC Corp. do with the funds?

A We sold the dollars to Swiss Credit Bank for francs, Swiss francs. We had Swiss francs delivered to United California Bank of London on time deposit with them for 186 days.

Q Mr. Silverstone, I show you Exhibit 40A which is an RCA Global Communications telegram or telex. Could you tell us what that document is?

A It is a document reflecting a telex sent to Meridian Deposit Brokers in London who acted as brokers in placing 3,130,000 Swiss francs on deposit with United

California Bank London from American IBC for 186 days, and giving them full details on where they would get the funds, where United California would get the funds, and further where the funds were to be repaid.

Q Where were the funds to be repaid?

A Swiss Credit Bank Zurich.

Q To whose account?

A In favor of American IBC Corp.

Q I show you Exhibit 40B which is a document entitled Confirmation, United California Bank and ask you what that is?

A This is a confirmation from United California Bank that they have taken and received -- that they are taking from us 3,130,000 Swiss francs for 186 days at an interest rate of 3-1/4 per cent per annum, on a 360-day basis, that it would yield 3,180,357.83 francs and it is repayable to Swiss Credit Bank Zurich and it is sent to American IBC Corp. It is received for American IBC Corp.

Q American IBC Corp. received that confirmation?

A Yes.

Q What did it do with it when it received it?

A It put it in the file.

Q Who selected United California Bank?

A We received the highest bid for the francs from

United California Bank so we put the funds on time, we being American IBC put the funds on time.

THE COURT: Who selected it? The question was who selected the bank?

THE WITNESS: American IBC Corp.

Q Yourself?

A Yes.

Q Did you solicit bids or offers as to what the rates would be on a time deposit?

A Yes, I did. I contacted a time deposit broker in London and asked them to give us bids and to give us the top bid.

Q Mr. Silverston, subsequent to May, 1973, did you receive any communications from Wells Fargo Luxembourg concerning the time deposit?

A Yes, I believe we received a letter asking us to confirm the time deposit.

Q I show you Exhibit 4. Is that the letter?

A Yes, they asked us for confirmation of the contract.

Q That is a contract for the time deposit?

A 43781 for which we had the time account receipt.

Q Mr. Silverston, did you sign any documents on behalf of American IBC Corp. with Wells Fargo Bank

International in connection with the loan of May 2, 1973?

A I believe I did.

Q Did you sign a promissory note?

A Yes.

Q I show you Exhibit 7. Is that a copy of the promissory note?

A I believe it is.

Q That is dated May 3, 1973, correct?

A Yes, it is.

Q Did you sign any of the other documents that you can recall?

A If I recall there was one other document with this.

Q I show you Exhibit 8. Tell the court what that is.

A This is an advance account agreement which I signed on the 4th of May with Wells Fargo Bank covering $1,000,000.

Q Who requested that you sign those documents?

A Wells Fargo Bank International.

Q Mr. Boland?

A Yes, I believe -- they may have come with a cover letter asking for my signature but I believe it was Mr. Boland.

Q In connection with the transaction of May 17, 1973, did you sign any other documents? Did you sign any documents?

A My letter of May 15th to them.

Q And your letter of May 15th is Exhibit --

A Number 9.

Q Did you sign a promissory note in connection with that transaction?

A No.

Q Did you sign an advance account agreement?

A No, I didn't.

Q Did the bank ever request, Wells Fargo International request that you do sign a promissory note?

A I believe they did in August.

Q I show you Exhibit 1[illegible], a letter from Mr. Hawkins to you as president of American IBC Corp. Is that the request you referred to?

A Yes.

Q And there was a promissory note attached to that?

A Yes.

Q Did you ever execute the promissory note?

A No, I didn't.

Q Mr. Silverston --

THE COURT: Have you told me about negotiation of the second loan? I don't seem to recall.

THE WITNESS: Specific negotiation?

THE COURT: Yes, what was the specific negotiation? What did you tell him about it and what relationship did it have to the form of the first loan, if any?

THE WITNESS: I recall that the spread between the three rates, the interest rates on dollars and Swiss francs and Swiss francs forward premium reached a level that it yielded a profit --

THE COURT: You mean again it would yield a profit on an arbitrage?

THE WITNESS: Yes. And I called him, Mr. Boland, and asked whether or not he would like to do a second transaction similar to the first transaction and he said he would get back to me. He did. He said that Wells Fargo was prepared to lend another $1,000,000 and we executed the second transaction.

THE COURT: Did you understand from Mr. Boland that the second transaction was to be on the same basis and the same type of transaction with Wells Fargo Bank as the first transaction?

THE WITNESS: It was going to be a similar basis. We were going to place the funds on time deposit where we got the highest rate, your Honor.

THE COURT: In other words, your arrangements with Wells Fargo on the second transaction were identical with those of the first transaction except for the details of the transaction itself?

THE WITNESS: Yes, except for the rates and such they were identical. We were going to borrow from them.

Q Mr. Silverston, the first time deposit, as I recall according to the exhibits, matured on November 2, 1973, is that correct?

A Yes.

Q What happened when the time deposit matured?

A The Swiss francs were paid via Wells Fargo Bank Luxembourg to Swiss Credit Bank Zurich. We used these francs--

THE COURT:You don't know that of your own knowledge, do you? You weren't there.

THE WITNESS: No, your Honor, but I don't think Swiss Credit Bank would have remitted the dollars.

THE COURT: You are telling me your conclusion as to what you think they should have done or would have done but you yourself didn't transact the business?

THE WITNESS: That is correct, sir.

THE COURT: That is generally called hearsay. Just tell me about the things that you personally did or personally saw or personally know and not what you infer or learned from other sources.

THE WITNESS: I know on the second -- we did receive it on November 2nd, some time after November 2nd we received a credit note from Wells Fargo crediting us value November 2nd with the principal and interest on the earnings for funds received from Swiss Credit Zurich and also a debit note debiting us the principal and interest of the loan, also value November 2nd.

Q I show you Exhibit 22, which consists of nine documents. Would you review those documents and tell us what they represent.

THE COURT: Aren't they self evident?

MR. MILLER: Your Honor asked for Mr. Silverston's personal knowledge. He was the president of the company and these are credit and debit advices which show the receipt of monies --

THE COURT: Whatever they show they show. I have it in front of me and I am looking at it.

MR. MILLER: I wanted to bring it to the attention of the Court.

THE COURT: I have Exhibit 22 in front of me at the moment.

MR. MILLER: I also call your Honor's attention to Exhibit 48, which is the statement of American IBC Corporation with Wells Fargo Bank International which shows the credit to the account and shows the debit for the account and leaves it with a balance of $159.98. That is at the end of the month.

THE COURT: All right.

Q I show you Exhibit 50, the financial report of American IBC Corporation for May 31, 1972.

Was American IBC Corporation on a fiscal year basis?

A Yes, May 31 was our fiscal year.

Q Was a financial statement prepared for American IBC Corporation for the year ending May 1973?

A No, it was not.

Q Could you tell the Court what the financial condition or what the assets and liabilities of American IBC Corporation were as of the end of May 1973?

THE COURT: We have a stipulation on that, don't we? That isthe stipulation.

MR. MILLER: June 1, '73, your Honor.

THE COURT: I thought it was the end of May.

MR. MILLER: I think it said June 1, as I recall.

THE COURT: June 1, that is the end of May. How about May 1, the end of April? I am interested in that.

Q The end of April, Mr. Silverston.

THE COURT: Was your position any better at the end of April than it was at the end of May?

THE WITNESS: Because of the deterioration of the dollar, your Honor, our position got successively worse month by month in our exchange contracts.

THE COURT: Were you insolvent at the end of

April 1973?

THE WITNESS: If we had to liquidate our foreign exchange positions we were.

THE COURT: By that I suppose what you mean is that unless the market lifted you out of the position that you were in at the end of April and the market referred to as the future market, that is the market after April, you were insolvent on April 30.

THE WITNESS: Your Honor, the market on the dollar didn't turn until the first quarter of the following year and the dollar just kept sinking and sinking and so did we.

THE COURT: You were insolvent with a prayer that the dollar would turn?

THE WITNESS: Yes, insolvent with a prayer that the dollar would turn or one or two other things would happen.

Q Mr. Silverston, was a copy of the financial statement of May 1974 furnished to Wells Fargo Bank International?

A Yes, it was.

THE COURT: May '72?

MR. MILLER: Yes, your Honor.

Q Did the financial condition of American IBC

Corporation deteriorate from the position on May 31, 1972 to May 31, 1973?

A Yes.

Q It did?

A Yes, it did.

Q Mr. Silverston, looking at the statement of financial condition, the corporation carries as an asset an item described Cedula Investment Colombia SA.

A Cedula.

Q At a value of $1,327,000 in round figures. Can you tell us what that asset represents?

A Cedulas are somewhat similar to our treasury bills. They are certificates issued by government, quasi government and government type insurance institutions in Colombia, some of which are income tax free in Colombia. This is the equivalent of Colombian pesos. This is the dollar equivalent of Colombian pesos at the rate of exchange at the time we obtained the peso funds.

Q Did American IBC also own lands?

A Yes, we did.

Q In Colombia, South America?

A We thought we did.

Q You thought you did. Could you tell us who

Mr. Lara is?

A Luis Lara, Jr. is the son of a very large industrial family in Colombia who worked with us along with his brother-in-law, Gonzalo Ospina, in Colombia in our operations in Colombia on a profit-sharing basis where American IBC received two-thirds of the profit and they received one-third of the profit.

Q Were Messrs. Lara and Ospina, were they employees of American IBC Corporation?

A They were officers of American IBC from the date of inception.

Q To when?

A I believe until probably sometime in January or February 1973.

Q Did they resign as officers?

A No, they didn't resign. They were removed as officers when we found out that the assets we had or thought we had were no longer ours.

Q Could you elaborate on that?

A We had invested in land, in building of houses, in starting a bank in Colombia and wanting to remain 100 per cent national in each country and I thought it best that we keep a very low profile as far as foreigners were concerned. So these were operated as Colombian entities where it was difficult to show that any foreign individuals were concerned, particularly Colombian banks it was very important as far as I thought that foreigners not show. Therefore, the stocks in the bank were owned in companies controlled by Ospina and Lara who I trusted implicitly despite warnings from many people, from separate people. These assets started to disappear after a change in management in Colombia. We pursued litigation for a while and it became too costly and in view of our deteriorating financial condition we just had to drop it.

Q In other words, Messrs. Lara and Ospina were claiming these assets as their own?

A Specifically claiming them as their own. Again, people told me that they claimed that American IBC had nothing to do with these assets, that they were assets of Ospina and Lara obtained by funds obtained by Ospina and Lara without intervention or intermediation, without anything to do with American IBC Corporation.

Q Who is Gustavo Arango?

A Mr. Arango was with Banco Capitero in Colombia and subsequently became the Wells Fargo representative for Latin America.

Q Wells Fargo Bank International?

A I don't know whether its Wells Fargo Bank International or Wells Fargo San Francisco.

Q Was Mr. Arango aware of IBC's dispute with Mrssrs. Lara and Ospina?

MR. STEWART: I object to that, your Honor.

THE COURT: How would he know except through hearsay?

Q I show you Exhibit 13, Mr. Silverston. Did you have any conversations with Mr. Arango?

A I had one conversation with Mr. Arango and I believe Mr. Romano had several conversations with him.

Q When did you have your conversation?

A The first half of March '73.

Q What was the substance of that conversation?

A Mr. Arango warned me that Ospina and Lara are going all over Colombia claiming they borrowed the money for the purchase of the bank and the lands and American IBC has nothing to do with it. Mr. Arango recommended that we immediately obtain legal counsel in Colombia.

Q Do you know Charles Lilien?

A I have met Mr. Lilien.

Q Who is Mr. Lilien?

A I believe Mr. Lilien is executive vice president of Wells Fargo Bank International New York.

Q Subsequent to the date of Exhibit 13, March 14, 1973, did you negotiate a proposed settlement with Messrs. Lara and Ospina?

A Yes, I did.

Q Was Wells Fargo Bank International in any way involved in that proposed settlement?

A I negotiated the settlement with Lara and Ospina in Aruba. I came back to New York. The settlement entailed delivery of promissory notes by Ospina and Lara to American IBC plus $100,000 in cash plus releasing the notes they had previously signed. We had agreed, Ospina, Lara, they had been selecting a bank to hold the old notes to which they would deliver the new notes of $900,000 and $100,000 in cash against release of the old notes and something else.

We agreed we should use Wells Fargo Bank International in New York. I called Wells Fargo, described the situation to them and subsequently gave them a letter of instructions on this thing. I may even have given them a copy of the contract. I don't recall.

Q Who did you call at Wells Fargo Bank International?

A Mr. Boland.

Q What did you say to Mr. Boland and what did he say to you?

A I told Mr. Boland we had settled with Ospina and Lara for about one-third of what we were entitled to, that left us with a big hole in Colombia but something I thought we could survive with and continue on with and I asked if he could be prepared to deliver to them, receive for us the new notes and $100,000 and release them to us against delivery of the old notes and a settlement with United Brands.

Q What did Mr. Boland say to you?

A He said that they would be pleased to do this.

Q Did he ask you any questions about the nature of the controversy?

A Mr. Boland was aware of our problems with Ospina and Lara. Mr. Boland told me on several occasions as this trouble deepened, he was one of the people who warned me about Ospina and Lara. He said they are not to be trusted, I should be careful.

Q And you told Mr. Boland --

A I didn't take his advice.

Q That you were getting approximately one-third?

A That is right.

Q I show you Exhibit 15. Is that the letter you wrote to Mr. Boland on May 1, '73, describing the proposed compromise and settlement?

A Yes, it is.

Q Was the compromise and settlement with Messrs. Lara and Ospina consummated?

A No, it was not.

Q Did Mr. Boland know that?

A Yes, he did. Lara and Ospina had asked me for an extension for some period of time. I told Mr. Boland we would agree to extend and nothing happened of it and I told them to forget it, they have disappeared, they are not paying.

Q How much was American IBC to receive in dollars under that settlement?

A $1 million. $100,000 in cash and $900,000 in notes.

Q Over a period of what time?

A Four and a half years.

Q So you were talking about assets which had a value of $3 million?

A Which we were getting $1 million for.

Q And which you had been carrying on in balance sheets as $3 million?

A That is right.

Q Did American IBC Corporation do business with United Brands or any subsidiaries or divisions of United Brands Corporation?

A Yes, we did.

Q What business did you do?

A We did some consulting work for them. We made clearing payments for bananas for them. They also entered --

THE COURT: Where, in Honduras?

THE WITNESS: No, your Honor, in Colombia.

We also borrowed pesos from them and we had some swap loans wherein we lent them dollars and they lent us Colombian pesos.

Q Did there come a time where a controversy between IBC and United Brands Corporation developed?

A Yes, sir.

Q When did that occur?

A The discussions started in December of '73, but the controversy, the real controversy started I guess May-June of 1973, around that time. I would say June of '73 they culminated.

Q Did that controversy ripen into a lawsuit?

A It ripened -- I would say exploded.

Q When did that occur?

A I believe June of 1973.

Q Did United Brands Corporation sue American IBC Corp.?

A They not only sued us, they attached our bank accounts.

Q Do you know how much they were suing American IBC for?

A In excess of $3 million.

Q And writs of attachment were served in connection with that action?

A I am not an attorney.

Q Your bank accounts were attached?

A Our bank accounts were attached.

Q By that what do you mean?

A The funds -- United Brands put up a bond, our bank accounts were attached and the funds in the bank account were turned over to the court or the marshal. I don't know to whom.

Q Which bank accounts were attached?

A In New York almost all of them except the one at Wells Fargo Bank International.

Q Are you familiar, Mr.Silverston, with the Banco de la Republica?

A Yes, it's the central bank of Colombia.

Q Did American IBC Corp. do business with the

Banco de la Republica?

A Yes.

Q What was the nature of the business?

A We bought clearing payments, trade payments, bilateral trade payments between Colombia and Eastern European countries and such accounts were cleared by the central bank.

Q In June '73, was there any controversy between American IBC and Banco de la Republica?

A Yes.

Q What was the nature of that controversy?

A We owed them about $600,000 that we couldn't pay.

Q Did you ever discuss that controversy with Mr. Arango?

A Yes, I discussed it with Mr. Arango.

Q What did you say to Mr. Arango and what did he say to you?

A I am trying to recall, excuse me a minute.

At the point before we settled with Banco de la Republica, if I recall, Mr. Arango called and said look, whatever else you do you can't have a fight with the central bank but at the time it was rather academic because we didn't have the funds to pay.

Q What was the nature of the claim?

A Banco de la Republica had presented documents under a clearing transaction and they were protesting to all the banks that we hadn't effected payment and that we owed them $590,000, $600,000, something like that.

THE COURT: Mr. Miller, is this area of testimony profitable in this case? We have it very clearly that you have an insolvent concern at the time of the two transactions and this stretching out of the obligations of this enterprise doesn't seem to me to be adding anything to the principal subject.

MR. MILLER: What I am proposing to do and I hope I am accomplishing it, is that I am bringing these facts to the attention of Wells Fargo Bank International. Mr. Arango was the agent of that bank, he was aware of these problems. Here was a company which owed $700,000 --

THE COURT: Let me put it to you very clearly: If what you say is true Wells Fargo knew it was dealing with an insolvent institution and made it an unsecured loan without any collateral.

MR. MILLER: Yes, sir.

MR. STEWART: Actually, Gustavo Arango was not an employee of the FBI.

THE COURT: I am talking about the contentions. Something doesn't gel.

MR. MILLER: The banks make mistakes. Mr. Boland, who handled the transaction, may have thought in his mind that he was dealing with a secured transaction. He had never done one of these transactions. He did not consult a lawyer and he failed to perfect any kind of a security interest or lien.

THE COURT: That is a subject for future determination.

MR. MILLER: That is our contention.

THE COURT: The present inquiry doesn't advance the existence or inexistence of security. What this case really gets down to is whether you are correct that the necessary pieces of paper or other forms of valid understandings were missing or whether they are to be spelled out in the circumstances and how that affects dealing with an insolvent.

MR. MILLER: I will be perfectly happy to end this line of testimony if the defendant will concede that they knew that American IBC Corp. was insolvent during this period of time or prior to the May transactions.

THE COURT: It seems to me you may be

proving too much and you may be hoisting yourself on a petard that on reflection you may want to re-think. I have examined these joint findings of fact and the contentions very, very carefully and listening to this witness and examining the papers of April 30 and May 1 and May 4 and May 15 results in certain impressions being gained. I don't see how all of this conversation about United Brands and Mr. Arango and the rest of it is really going to be decisive on the issue that is involved. They were either a secured creditor or they weren't.

MR. MILLER: Which I believe, your Honor, is a legal question.

THE COURT: It might be a factual question before you get to any question of law.

And they received within the perimeter of four months of bankruptcy an amount of money which affected the assets of the bankrupt within the meaning of section 60 of the Bankruptcy Law.

The only other thing that is involved here is whether at the time they received it they were sufficiently on notice that they were being preferred. What is all the rest of this?

MR. MILLER: Not that they were being preferred. I respectfully disagree. Sufficiently on notice that they knew this corporation was insolvent.

THE COURT: That is what I am talking about.

MR. MILLER: If Mr. Stewart stipulated to that we could save a lot of time.

MR. STEWART: They definitely were not aware that the corporation was insolvent and I will not so stipulate. They were unfortunately blissfully unaware of the financial condition of American IBC at the time.

THE COURT: The question is whether unawareness can be blissful.

MR. STEWART: It isn't as long as they are here, your Honor.

THE COURT: I don't know. You can't close your eyes to the obvious. The real question is whether you did close your eyes to the obvious. I am just wondering whether this whole litigation isn't being taken away from the actualities of the transactions. But you go ahead and prove your case your own way.

MR. MILLER: Thank you, your Honor.

Q Mr. Silverston, American IBC Corp. entered into an agreement to compromise and settle the claim of the Banco de la Republica?

A Yes, we did.

Q And that agreement provided for a cash payment of $300,000?

A Yes.

Q An installment payment over a period of time.

A Yes.

Q And you entered into that agreement because American IBC didn't have the funds to pay the $700,000?

A $600,000, that is correct.

Q Was there another controversy with the Banco de la Republica in connection with a Bulgarian transaction?

A This is the part of the same transaction. That was part of the same transaction.

Q Did there come a time when the Banco de la Republica severed its relationship with American IBC Corp.?

A I would say we never had a relation with them as such. We did business with them and after this happened, of course, they didn't talk with us as far as business was concerned.

Q Mr. Silverston, on November 19, 1973, the second time deposit with United California Bank matured, is that correct?

A Yes, sir.

Q Did you meet with Mr. Boland on that date?

A I did.

Q Where did you meet with Mr. Boland?

A First at the offices of Wells Fargo Bank International and then we went together to lunch subsequently.

Q Was that a prearranged meeting?

A Yes.

Q Who arranged the meeting?

A I did.

Q How did you do that?

A By telephone a week or so before.

Q What did you say to Mr. Boland when you called him on the telephone?

A I said I would like to talk to you, can we meet on the 19th in the morning?

Q Was there any reason why you wanted to meet with Mr. Boland?

A Yes, but I didn't tell him what the reason was.

Q What was the reason?

A We were in trouble. We had reached about the end of our rope.

THE COURT: Did you ever tell him you were in trouble prior to this time?

THE WITNESS: I told him about problems but I never came out and said we are in trouble and we are coming down to the end of the line. At this point I didn't know where to turn. I didn't want to just wait around for them to call me and scream where is our million dollars. So I went down to the bank to face the music. And I wanted to explain in detail what happened, how it happened, what I planned to do and how I hoped we possibly could salvage the situation and I started by analyzing or reflecting on Colombia, United Brands and our exchange position.

I thought I could have solved the problem if it was just the exchange position and not the disaster in Colombia, but certainly with the attachments on our accounts it was almost impossible to do business.

Mr. Boland again reiterated that he had warned me about the dangers in Colombia in dealing with these people and he wasn't the only one who had warned me. He enumerated other names who had warned me.

We went to lunch --

Q What time did you arrive at the bank?

A Somewhere between 10:30 and 11 o'clock.

Q Did you see Mr. Boland right away?

A Within two or three minutes.

Q Were you in his office?

A In his office.

Q Was there anybody else present?

A In his office with us, no. Just he and I. Someone may have come in to give him papers or say something.

Q The conversation was between you and Mr. Boland?

A Correct.

Q And you related what you described in your testimony?

A Yes. I did not specifically say that you are not getting the million dollars today.

Q What time did you go to lunch?

A Approximately 12, shortly after 12. We might have stopped at the bar for a drink at the Bankers Club and we went on over lunch. I don't drink very much but I had a couple of drinks that day. I was feeling less pain.

I tried to describe a transaction or two that possibly we could do if we could get a bank to help us, perhaps if they also could help us and we would make substantial amounts that would solve the problem or part of our problem.

I left from the Bankers Club after lunch and went back to my office and sat down and I was absolutely astounded.

THE COURT: Never mind the theatrical reflections on your part. We will decide whether you should have been astounded.

THE WITNESS: Respectfully, your Honor --

THE COURT: Just go on and tell me what happened.

THE WITNESS: Nothing happened after that. I made an appointment to discuss the transaction again on the following day with a man responsible for Latin America and the reason I did that, number one, I wanted to do the transaction and, number two, I wanted to be there when the shoe fell.

Q Did you go to the bank the next day?

A I went to the bank on the 20th.

Q What time did you arrive at the bank?

A Shortly before noon.

Q Did you meet anybody?

A I saw Mr. Boland. He introduced me to this man I was going to have lunch with. On the way out I met Mr. Lobonov who approached me looking very bleak and concerned and said Bill told me about your problems. I don't recall exactly what I said but I was commiserating with myself and I went to lunch with this other gentleman. We had lunch and we discussed the transaction and I went back to my office.

Q What was the name of the gentleman you had lunch with, if you recall?

A Subsequently I have read -- I don't recall from my own recollection his name. I have read that it was Mr. Vanveerson.

Q Who is Mr. Lobonov?

MR. STEWART: I move these characterizations of how Mr. Lobonov looked be stricken.

THE COURT: I will disregard it. I don't see how that bears on the question of what you did in your state of bliss, your client's state of bliss.

Q Mr. Silverston, going back -- withdrawn.

Mr. Lobonov is an officer of the bank?

A I believe so, yes.

Q Had you done any business with Mr. Lobonov?

A Mr. Lobonov I believe was in charge of East Europe and the Middle East and I had introduced him-- I had tried to assist him in the bank's doing business in both areas. I introduced him to some people and I had written some letters of introduction for him in Bank International Eastern Europe with the foreign trade banks, we had been doing business with as American IBC, which we were close to and it was a reciprocating factor and Mr. Lobonov and Wells Fargo Bank had related clients to me where we could do business together.

Q What is a switch transaction?

A A switch transaction is a transaction where --

THE COURT: I thought that had to do with a former mayor.

A Switch transactions are usually a bilateral trade treaty where goodsare supposed to be shipped only to a specific destination under the treaty but they are shipped toward that destination and the documents are switched, meaning new certificates of origin or new certificates of consumption are issued and the goods are sent to a different destination, hence the name switched.

Q Was Mr. Lobonov in a proposed switch transaction for American IBC in a company called Sunkist?

A I don't recall whether it was actually a switch transaction or payment. It would ultimately be a switch. Payment under the clearing where goods have different origin, so it could be construed as a switch, yes.

Q Was that pending on November 20, 1973?

A I don't think there was a transaction pending.

I believe we were -- we had been consulting. Mr. Lovonov had phoned me from California from Sunkist offices a few weeks before about the possibility of assisting them in a transaction and I don't recall whether it was the Middle East or East Europe. We had some discussion on this and I believe I did write a letter to Sunkist. It should be in the files, outlining my thoughts on the matter.

Q Do you know whether Mr. Lobonov informed Sunkist of the financial difficulties of American IBC?

MR. STEWART: I object to that, your Honor.

THE COURT: He may say whether he knows.

A I know now, I didn't at that time.

MR. MILLER: Can we have two minutes, please, your Honor.

THE COURT: Yes.

Q Mr. Silverston, going back to May 2, 1973 and your discussions with Mr. Boland concerning the transaction of May 2, 1973, was there any discussion of security?

A When I discussed this I told Mr. Boland that if he wanted to I would lodge the time account received as collateral.

Q You offered the time deposit receipt?

A The time account receipt, correct.

Q What did Mr. Boland say?

A He didn't comment on it. I believe it's in the letter summarizing the transaction that I sent.

Q Did you ever deliver the time deposit receipt?

A No.

Q To Wells Fargo Bank?

A No, we didn't.

Q Did American IBC Corporation maintain control of that time deposit receipt?

A It's in our files.

Q Did Mr. Boland ask you to sign any statements under the uniform commercial code?

A He didn't ask me to sign any statements other than those I had signed.

Q Other than your offer of the time deposit receipt was there any other discussion of security?

A No.

Q Was there any discussion with Mr. Boland about the capacity in which Wells Fargo Luxembourg was acting?

A No.

Q Did you deliver any property of American IBC Corporation to Wells Fargo Bank International?

A I am not an attorney. When you say property what do youmean? I delivered the promissory note.

Q Other than the promissory note and the advance account agreement.

A No.

Q And you on behalf of American IBC Corp. had issued directions to Wells Fargo Luxembourg to pay the Swiss francs at maturity to Swiss Credit Corporation?

A Swiss Credit Bank. Yes, those instructions were given through Wells Fargo.

Q At your request?

A That is right.

Q Did American IBC Corp. have an account at Swiss Credit Bank?

A In Zurich?

Q Yes.

A Yes, we did.

Q Did American IBC Corporation on occasion draw from that account?

A We instructed them to transfer funds.

Q Have you a number of transactions in that account?

A I believe so.

Q Did you pay various obligations of American IBC Corporation from that account?

A Yes.

Q And you on behalf of American IBC Corp. instructed the Swiss Credit Bank on November 2, 1973to remit the funds to New York?

A I instructed Swiss Credit Bank to remit the funds to New York long before November 2. But I instructed them to remit the sums value November 2 so the funds would be credited to us here on November 2.

MR. STEWART: I object to this line. The documents set forth the instructions.

THE COURT: Sustained and strike out the answer. I can't do anything about it, you know, if the evidence goes in without objection.

Q Mr. Silverston, in connection with the transaction of May 17, 1973 and Exhibit 9, did you have any discussion with Mr. Boland about security?

A None.

Q Did you offer delivery of the time deposit receipt?

A No, I didn't. I told him it was a similar transaction.

Q Mr. Silverston, referring to Exhibit 1, the letter of April 30, 1973 and Exhibit 9, the letter of May 15, 1973, you drafted those letters, did you not?

MR. STEWART: I object as leading.

MR. MILLER: Withdrawn.

Q Who drafted those letters?

A I did.

Q Did you show a draft of each of those exhibits to Mr. Boland before you signed them?

A No, I didn't.

Q Did Mr. Boland or anybody at Wells Fargo Bank International make any comments about these letters, these exhibits 1 and 9 when they were received?

MR. STEWART: Objection to this as leading.

THE COURT: That is not leading.

Did anybody make any comment to you about the letters?

THE WITNESS: No, your Honor.

Q Mr. Silverston, was there any reason why the language of letters Exhibit 1 as compared to Exhibit 9 is different? I call your attention to Exhibit 1, paragraph 4 in which you say this deposit is lodged as collateral for the $1 million loan and is subordinated to such claim.

A I had offered it. This is what I had offered to them.

Q And there is no similar sentence in Exhibit 9?

A No.

Q Did there come a time in connection with the second transaction, the time deposit at United California Bank, that you changed the instructions concerning the remittance of the proceeds?

A Yes, there was.

Q When did that occur?

A I believe July or August.

Q Will you tell us the circumstances of how that came about?

A As our exchange losses continued to deepen I think Swiss Credit Bank got worried and asked us how I was going to repay and I told them that we used the funds at United California Bank and they said well, we would like a promise from United California Bank.

MR. STEWART: I object to these conversations with these third parties. I think the documents speak for themselves.

THE COURT: They are not binding on the defendant.

MR. MILLER: Just tell us what you did, Mr. Silverston.

THE WITNESS: I instructed United California Bank to give their unconditional promise, this irrevocable promise to pay the francs maturing on November 19 to Swiss Credit Bank Zurich.

Q How did you do that?

A By letter, I believe. I might have sent them a Telex with the letter, I don't recall. But I put it to them in writing. It must have been in a letter form.

Q So that you issued instructions to United California Bank on behalf of the American IBC Corp.?

A Correct.

Q As the president of that corporation you deemed those funds available to the corporation?

A That is correct.

THE COURT: Of course, you see a question like that, an acknowledgement by the witness leaves me completely cold. It's not evidence, it's testimony by the attorney. I have to be guided under those circumstances where a leading question was put and the whole thing is put in the mouth of the witness by what the documents reveal and what their fair inferences are.

There may be dual inferences from the conduct of the witness at that time.

I don't see how his present protestations change what he wrote at the time.

Q By the way, Mr.Silverston, did American IBC Corp. have any other funds available in June or July or August of 1973 with which to pay Swiss Credit?

A No, we had hopes. No funds.

Q What happened on November 19, 1973 in respect to the claim of Swiss Credit Bank?

MR. STEWART: What date?

MR.MILLER: November 19, 1973.

A I don't quite understand what you mean.

Q Was the claim of the Swiss Credit Bank for approximately $1 million paid on November 19, 1973?

A We had instructed Swiss Credit Bank to utilize the proceeds of the Swiss transaction that was paid to our account at Swiss Credit Bank for which they bought dollars with to liquidate all liabilities between American IBC and Swiss Credit Bank with these funds.

Q Do you know whether the monies which came in from United California were credited to the account of American IBC?

A Yes, sir, I believe they were.

MR. STEWART: I object to that at to whether he knows what happens at that point.

THE COURT: He says he believes they were. That adds nothing to this record. His belief is interesting but not evidence.

Q Is Swiss Credit Bank a creditor of American IBC Corp.?

A Yes, they are.

Q Do you know the amount of that claim?

A About $1 million.

Q Do you know the basis of that claim?

A Yes, I do.

Q What is the basis of that claim?

A That instead of liquidating the obligations of American IBC to Swiss Credit Bank with the funds that they would have received from United California Bank and converted for us to dollars, they were to pay the funds in accordance with the initial instructions to Wells Fargo Bank International New York.

Q Mr. Silverston, just referring to the bank statement of American IBC Corp. for the month of November, 1973 with Wells Fargo Bank --

THE COURT: Exhibit 48.

MR. MILLER: Exhibit 48, yes.

Q On November 19, $1 million was credited to the account of American IBC?

A $1,046,000 was credited, right.

Q And thereafter debited?

A Thereafter debited --

THE COURT: There was no debit. There is no debit on that statement thereafter at all.

THE WITNESS: On the left side.

MR. MILLER: There is a credit and a debit which leaves a balance of $159.

THE COURT: You said it was thereafter debited, it wasn't thereafter, it was debited first and credited second.

THE WITNESS: Yes, that same day.

THE COURT: I understand that. I am just correcting thesequence as it appears on the exhibit. I don't know what the sequence of the event was but that is the way the exhibit reads.

MR. MILLER: Very well, your Honor.

I have no further questions of Mr. Silverston.

THE COURT: All right. We will take a short recess.

(Recess)

THE COURT: For the guidance of counsel in view of the fact that we have had a long morning session I propose to suspend at a quarter of one until two o'clock. Take about 20 minutes of cross-examination and then we will continue after lunch.

CROSS-EXAMINATION

BY MR. STEWART:

Q You are a defendant in a lawsuit brought against you here in this court by Swiss Credit Bank, are you not?

A I am a defendant in a lawsuit brought against me by Swiss Credit Bank. I don't know if it's this court or what court.

Q I show you this complaint --

THE COURT: We don't have to pause on that kind of stuff. It's obvious that there is no objection to that. You know he is a defendant here. Go ahead.

Q In that suit Swiss Credit Bank seeks to recover some $680,000 against you on your personal guaranty to it, isn't that right?

A That is correct.

Q Weil, Gotshal & Manges is representing Swiss Credit Bank in that action, isn't that true?

MR. MILLER: I will stipulate to that.

Q Swiss Credit Bank is a major creditor in the bankruptcy proceeding of American IBC, isn't that a fact?

A That is correct.

Q Isn't it true to the extent that the trustee is successful in this action in recovering money against Wells Fargo that means that much less that you will be liable to pay the Swiss Credit Bank on your personal guaranty, isn't that correct?

MR. MILLER: Objection, your Honor, it calls for pure conjecture as to what happens in the bankruptcy estate and what the distribution will be.

THE COURT: Sustained.

Q Isn't it a fact that that action is being, that action by Swiss Credit Bank against you is being held in abeyance pending the outcome of this lawsuit, isn't that correct?

A It may be. I don't know. They haven't been pressing it at the moment.

Q Has anyone given you any assurances as to what will or will not happen in that lawsuit by Swiss Credit Bank depending on the result of this lawsuit?

A No, no one has.

THE COURT: For my convenience give me the date of your documents. I have my exhibits in chronological order and not in numerical order.

MR. MILLER: May 2, 1973 is Exhibit 2, your Honor.

THE COURT: All right.

Q I show you Exhibit 2, the letter of May 2, and turn to the second page, please, Mr. Silverston. Is that your signature at the bottom?

A My signature -- no, it's not. This is Mr. Boland's signature.

Q I show you this which appears to be identical with Exhibit 2 with one exception, it contains your signature.

A This is my signature.

MR. STEWART: Has that been entered and marked?

MR. MILLER: I have never seen it. It's never been produced before.

MR. STEWART: Yes, it has.

MR. MILLER: It has never been produced before.

THE COURT: It's produced now.

MR. STEWART: I offer it now.

(Defendant's Exhibit A was marked for

identification)

MR. STEWART: You have it right there.

MR. MILLER: Your associate just handed it to me. I find it surprising that the bank continually finds documents --

THE COURT: Let's get on with the case. This is not going to help getting into personal acrimonies. Is the document Exhibit A a copy of Exhibit 2 except it has the countersignature of Mr. Silverston on it?

MR. STEWART: Yes, sir.

THE COURT: Now I understand what it is.

(Defendant's Exhibit A was received in evidence)

Q Isn't it a fact that this is the actual document covering the first transaction?

MR. MILLER: Objection. It calls for a conclusion of law.

THE COURT: This document covers the first transaction, doesn't it?

THE WITNESS: It does cover the first transaction. It's incorrect, your Honor. It's off by one day. The document itself is off.

THE COURT: Let the lawyers try their case. You have enough problems as a witness.

Q With respect to both of the transactions in question here, Mr. Silverston, didn't you assure the bank from the very beginning that they were totally secured?

A I am not an attorney. I assured the bank --

Q Didn't you tell them that?

A No, I didn't.

THE COURT: Did you tell them that they were lending money without security?

THE WITNESS: No, sir.

THE COURT: Did you tell them this was a collateralized transaction?

THE WITNESS: Your Honor, on the first transaction I told them I am prepared to give the TA as collateral --

THE COURT: When you explained the transaction to them didn't you tell them that the time deposit was to be collateral for the transaction? Doesn't it say so right in your paper?

THE WITNESS: On the first transaction, your Honor, I offered it. Yes, I did. I told them I am prepared to do this.

THE COURT: Then you signed a letter saying that that was the nature of the transaction, isn't that right? You signed the letter Exhibit A.

THE WITNESS: Yes, I did.

THE COURT: And that letter right on the front of it says you have agreed to lodge with us as collateral a Swiss franc time deposit.

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead. Answer the questions now.

Q I show you this excerpt in the Journal of American IBC, and I ask that it be marked as Defendant Exhibit B.

THE COURT: Haven't these documents been premarked? They should have been premarked. This takes an awful lot of time, Mr. Stewart, for no reason at all. During the recess I will be very happy if you take all your papers that you are going to offer and premark them. You can give them any marks you want to. But don't let's take time offering things to be marked. Take this, Mr. Clerk. Mark it Exhibit B.

(Defendant's Exhibit B was marked for identification)

THE COURT: The trial is supposed to be conducted to get evidence and not to deal with exhibit marks.

(Defendant's Exhibit C was marked for identification)

(Defendant's Exhibits D and E were marked for identification)

MR. STEWART: I am sorry, your Honor, I thought the plaintiffs had already done this.

THE COURT: That is what they are complaining about so far as the bank is concerned. They are saying the bank was doing a lot of thinking but not acting.

Q I show you Defendant's Exhibit B, an excerpt from the books of American IBC.

Would you read the description in your own journal.

MR. MILLER: I object. It's in evidence. It speaks for itself.

THE COURT: For my convenience read it because it's in handwriting and I may not be able to decipher it.

A "Purchase Swiss francs, $3,240,000, loans payable Wells Fargo NA, loans from Wells Fargo was used to finance purchase of francs which were put into a time deposit account and pledged on collateral or as collateral for the loan 11/2/73, see some entry 49 filed for" -- I can't read the next word -- "for details."

Q Would you read the second description from your own books of the second loan transaction.

A "Purchase Swiss francs, 3,130,000, notes payable Wells Fargo Bank NA, loans from Wells Fargo was used to finance purchase of francs which were put on a time deposit account and pledged as collateral for the loan due 11/19/73, see CL No. 47 for details, filed for details."

Q That is the way your own books carried the two transactions, isn't that right?

A Obviously.

Q I show you Defendant Exhibit C and refer you to the top of Defendant Exhibit C, time deposits. Would you read those, please.

A Time deposits pledged as collateral, see contra GLLC2.

Q And below that the description of the time deposit.

A Wells Fargo Luxembourg, 3,240,000, UCB London, 3,130,000.

THE COURT: What is the source of that document Exhibit C? What does it purport to be? Where does it come from?

THE WITNESS: Apparently from the books of American IBC Corporation, your Honor.

THE COURT: Which book,is that the journal? Do you know?

THE WITNESS: I have no idea. Exhibit B is marked journal 1973 and Exhibit C is marked time deposits pledged as collateral.

THE COURT: All right. In other words, that is a page of the books of account of American IBC?

THE WITNESS: Correct.

THE COURT: Does Exhibit C refer to both time deposits or just to the one?

THE WITNESS: To both.

THE COURT: Both time deposits?

THE WITNESS: Yes, sir.

Q I show you Exhibit D entitled time deposits under date of June 1. Would you read that?

A Time deposits pledged as loan collateral, United California Bank London, 3,130,000 Swiss francs, Wells Luxembourg, 3,240,000 Swiss francs. They are backwards.

Q In what amounts?

A 3,130,000 Swiss francs, 3,240,000 Swiss francs, 1 million, 1 million.

Q I show you Defendant's Exhibit E, loans payable, and ask you to read the description of the loan.

A Foreign currency, Wells Fargo Bank NA, 1 million, maturities 11/2 and 11/9, November 2, 11/9. Loans payable foreign currencies secured by time deposit, Wells Fargo Bank NA, November 2, 1973, Wells Fargo Bank NA, November 9, 1973.

THE COURT: Again this is an extract from the books of account of American IBC?

THE WITNESS: Yes, sir.

THE COURT: Is that right?

THE WITNESS: That is correct, your Honor.

THE COURT: Are you going into a new subject? If you are I will declare the recess now, otherwise I will let you finish this particular line.

MR. STEWART: I am going on to a new subject.

THE COURT: All right.

(Luncheon recess)

AFTERNOON SESSION
2:00 p.m.

THE COURT: Go ahead, Mr. Stewart.

SHELDON SILVERSTON resumed.

CROSS EXAMINATION CONTINUED

BY MR. STEWART:

Q Mr. T. K. Warner was the former financial officer of United Brands, isn't that correct?

A Yes, sir.

Q You negotiated a transaction with him some years prior to these transactions, isn't that right?

A I negotiated with lots of people at United Brands.

Q Including Mr. T. K. Warner?

A Including Mr. Warner.

Q Was that negotiation later the subject of United Brands' action against you?

A I don't believe the negotiation was the subject.

Q The transaction was the subject of the negotiation?

A One of the negotiations was the subject, yes, sir.

Q And Mr. T. K. Warner left the employ of United Brands shortly thereafter, isn't that right?

A No, it's not.

Q When did he leave?

A I think at the end of 1972. I am not sure. I don't recall.

Q And he then joined American IBC as a consultant, isn'tthat right?

A He did not join American IBC. He had a consultant contract with us. He joined Robert Anderson & Company as a full partner.

Q With a consulting contract with your operation?

A Subsequently he got a consulting contract with us.

Q The United California time deposit was placed through Meridian Deposit Brokers, is that correct?

A That is correct.

Q Did you ever have any financial interest in Meridian Deposit Brokers?

A I have no financial interest.

Q I don't mean now. Did you earlier at any time have a financial interest?

A I had no interest in Meridian Financial

Brokers Limited.

Q Did Mr. Warner?

A Not to my knowledge.

Q Did Mr. Herbert Walker?

A Not to my knowledge.

Q Were you a director of Meridian Deposit Brokers?

A I was a director of Meridian Deposit Brokers and I still am.

MR. MILLER: Can we fix a point in time?

THE COURT: If it isn't done on direct you can do it on cross.

Q Meridian Deposit Brokers received a fee, did they not, for the placement of the United California time deposit?

A Yes, they did.

Q How much of a fee?

A I believe 1/50 of 1 per cent per annum.

MR. STEWART: Has the entire spiral notebook of Mr. Silverston been marked?

MR. MILLER: Yes, Exhibit 21.

Q I refer you to page 8 of Exhibit 21 and in particular the language agree 40, 40, 20, SS, I assume that is Sheldon Silverston, is that right?

A I assume so.

Q T. K. Warner, T. K. and H. H. W. for Herbert Walker, agree sell Meridian.

A One line has nothing to do with the other. The 40, 40, 20, as I recall in November, if you want me to explain it?

Q Yes.

A That was on the formation of a company in New York. At that time we went into the paper business, if I recall, or were contemplating going into the paper business and there was a man who had proposed this transaction and I had told Tom Warner that if I entered the transaction rather than one-third, one-third, one-third I had an agreement with Herbert Walker that if I entered into a transaction for a new company or something like that that he would have part of the stock. It was contemplated at that time that if we went into this transaction or formed this corporation that stock would be divided 40 per cent for Warner, 40 per cent for myself and 20 per cent for Walker.

Q And that has nothing to do with agree sell Meridian?

A Absolutely not. At that time I believe there was an interest by some people in buying a money brokerage company. Money brokers are licensed by and have to belong to an association. I had asked Tom Warner whether or not, or this may be a note to me to remember to ask Tom Warner whether or not the stockholders of Meridian would agree to sell the company. One thing has nothing to do with the other.

May I make another comment on it?

Q If you tell me the two are unrelated, that is the answer.

A Yes, because the other things are unrelated too.

You had a conversation with Mr. Vollenweider in June 1973 with respect to the advance of Swiss Credit Bank to you or American IBC, isn't that right?

A I don't recall. I probably did. I know I had conversations with him during the summer of 1973.

Q You told him in June that you had a time deposit with United of California which could be used to pay Swiss Credit Bank for its advances, isn't that correct?

A I told him during the summer of '73. I don't recall if it was June. It may very well have been June. I just don't recall.

Q You didn't tell him that that United California time deposit was carried on your own books as having been pledged as collateral to Wells Fargo, did you?

A I didn't know that it was carried on our own books, that it was pledged to Wells Fargo as collateral.

Q Until I showed them to you today?

A Until it was pointed out to me within the last two months that it was carried so on the books.

Q So that you didn't tell Mr. Vollenweider it was carried on the books as collateral, pledged as collateral to Wells Fargo, is that right?

A That is correct, I did not tell him such.

Q Referring to Plaintiff's Exhibit 40 I refer you to the letter of May 15 from American IBC to United California Bank London. Did your conversation with Mr. Vollenweider occur prior to the sending of that letter?

A No, it did not.

Q It occurred afterwards?

A Yes, this was the inception of the transaction.

MR. MILLER: May we have the date of the

letter?

THE WITNESS: May 15.

Q I am referring to the letter of June 15, which you wrote to United California.

MR. MILLER: Exhibit 40 has a number of documents in it.

A I don't recall whether this letter was the result of a conversation or a telex exchange.

Q This letter referring to your letter of June 15 to United California Bank in which you directed them to acknowledge to Mr. Vollenweider that they had your irrevocable instructions to pay this sum to Swiss Credit Bank at maturity?

A That is correct.

Q You don't recall whether you talked to Mr. Vollenweider before or after that letter was sent?

A I don't recall whether that letter was sent -- which it was sent at the request -- I was requested by Swiss Credit Bank to have United California Bank confirm that they irrevocably would pay the Swiss francs to Swiss Credit Bank for the account of American IBC at maturity. This was the request of Swiss Credit Bank.

Q When did you receive the request?

A That is the point I am trying to make. I don't recall, shortly before that. Shortly before the date of that letter. I don't recall whether that came to us by telex, by letter or in a telephone call. But I do recall that Swiss Credit Bank requested that they receive confirmation from United California Bank.

Q They initiated the request?

A Yes.

Q They were aware of the time deposit at United California Bank at the time?

A Yes, they were aware of it.

Q Were they also aware of the source of the funds for that time deposit, to your knowledge?

A They would be aware of how the funds were transferred or were they aware of the source of the funds, how we obtained the funds?

Q Yes.

A They may not have been.

Q The source where the funds came from.

A They would be aware -- they should have been aware that the funds were transferred to their credit, the dollar funds were transferred to their credit at Chase Manhattan Bank by Wells Fargo and that the Swiss francs resulted from our using those dollar funds transferred into their account at Chase to pay them for the Swiss francs which they in turn transferred to the United California Bank, London.

MR. MILLER: I move to strike the answer. The answer was prefaced with the statement they should have. It's the witness' belief rather than a fact.

THE COURT: So much of the answer which says that United California was aware that the money came through Chase Bank from Wells Fargo is retained and the words "should have been aware" seems to be surplussage.

Q After that request was recieved you acceded to the request or did as they asked, isn't that right?

A That is correct.

Q The papers which have been introduced already and shown to you were the instructions that you sent following up on that request, isn't that correct?

A That is correct. There may have been another letter. It may have been the initial information we got could have been from United California Bank, London.

Q The initial information?

A The initial request may have come from Swiss Credit via UCB London, I don't recall.

Q You don't know, in other words?

A I remember a letter from UCB London. I don't recall what it said at the moment.

Q I show you the documents in Exhibit 40 succeeding your letter of June 15 to United California Bank, namely the letter of June 19 from United California Bank to Swiss Credit Bank, United California Bank to Swiss Credit Bank, June 19, Swiss Credit Bank's letter of June 25 acknowledging receipt of the June 19 letter and the telex requesting irrevocable instructions.

THE COURT: That is dated July 16.

MR. STEWART: Yes, sir.

Q And the letter of Herbert Walker of July 16 to United California Bank, and the succeeding telexes in that exhibit and I ask you if those are the instructions that were sent at your direction.

MR. MILLER: We have no issue with that. We will stipulate to that just to move along. It's in the findings of fact.

THE COURT: I don't understand what was gained after Mr. Silverston on June 15 confirmed that the United California Bank was irrevocably instructed to pay to the Swiss Credit Bank, what was all of the necessity for the July 16 interchange? Isn't there a mistake on the part of somebody in assuming that the word irrevocable had not been communicated on June 16?

THE WITNESS: I believe so, your Honor. The telex from United California Bank to American IBC Corp. which was sent in July states that they left the word irrevocable out of their confirmation to Swiss Credit. I guess they wanted this reconfirmed.

THE COURT: But the UCB said "your letter did not specifically give us such an instruction." It sounds to me like somebody was being sticky. The June 15 letter certainly did say irrevocable.

Let's go on.

Q I show you defendant's --

THE COURT: The most I can make out of that is that although they had irrevocable instructions they weren't instructed to announce it to somebody else and now theywere instructed not only that it was irrevocable but they should say so.

Q I show you Defendant's Exhibit Z and ask you whether that is the request you referred to from Swiss Credit Bank?

MR. MILLER: Z?

MR. STEWART: I believe it's Z.

A I am not sure. I believe it is, but I am not sure.

THE COURT: Mr. Stewart, if you have an extra set of your papers you might have your assistants hand them up so that I can integrate them in my chronological sequence of papers.

MR. STEWART: Yes, sir, we will do that.

Q Is that your recollection?

A That is my recollection.

Q That this is the initial request from the Swiss Credit Bank?

A I am not sure. I believe it is.

Q Mr. Boland called you on or about December 7th of '73, did he not?

A Mr. Boland phoned me shortly after I had a conversation with Mr. Lilien which was in early December.

Q On page 51 of your spiral notebook, Exhibit 21, under date of December 7 the notation Bill Boland got cable. Do you recall talking to Mr. Boland on that date?

A I don't know if I talked with Mr. Boland. If Wells New York got a cable on that date and called me I would have talked to somebody from Wells. I don't recall who it was. But Bill Boland -- it may have been Bill Boland.

Q At that time you told Bill Boland that you had not pledged the United California time deposit to Swiss Credit Bank, did you not?

A No, I did not.

MR. MILLER: Objection, your Honor.

THE COURT: Overruled.

Q You assured him that you posted other collateral but certainly not Wells Fargo collateral to Swiss Credit Bank, isn't that true?

A No, it's not.

Q And you told him that Swiss Credit Bank was simply mistaken, isn't that right?

A No, it's not.

Q You had a subsequent conversation with Mr. Lilien, did you not?

A No, I thought the conversation with Mr. Lilien was first.

Q Whenever you thought the conversation was where Mr. Lilien called you with respect to this demand cable from Swiss Credit Bank demanding the return of the funds, you assured Mr. Lilien at that time that Swiss Credit Bank was simply confused and that you hadn't posted Wells Fargo's collateral to Swiss Credit Bank, isn't that true?

A No, it's not. I told Mr. Lilien at that time because he said to me "I have reviewed the files and I don't see that we are secure and I am just wondering what to reply to them." It was not a friendly conversation.

MR. MILLER: The witness has not finished --

THE COURT: Please, let the witness finish.

A And I recommended to Mr. Lilien that Wells should consult their attorneys and notably to Swiss Credit prematurely.

Q Didn't you assure tham that Swiss Credit Bank was mistaken and that you had not posted Wells Fargo's collateral?

A I did not.

Q You had a subsequent conversation with Mr. Lilien on December 12, isn't that correct?

A No, I don't believe so, because I refusedto speak to Mr. Lilien after our first conversation. I had a subsequent conversation with Mr. Boland.

Q And in that conversation with Mr. Lilien didn't he tell you that he had received --

A I didn't have a second conversation.

Q Let me finish the question.

In a conversation with Mr. Lilien didn't he tell you that he had received copies of the assignment documents from Swiss Credit Bank and that Swiss Credit Bank had advised him that they thought they were dealing with a crook?

A No, I did not have a second conversation with Mr. Lilien because in the first conversation Mr. Lilien had called me a crook and that is the reason why I did not have a second conversation with him.

Q After he relayed this conversation of Swiss Credit Bank to you didn't you assure him, one, that you hadn't pledged the collateral --

A I had no second conversation with him.

MR. STEWART: I have no further cross, your Honor.

THE COURT: Any redirect?

MR. MILLER: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Silverston, I show you Exhibits B, C, D and E. Did American IBC Corp. owe any money to Wells Fargo NA in May or June of 1973?

A Wells Fargo NA and Wells Fargo San Francisco?

Q Yes.

A No, we did not.

Q Who prepared the originals of Exhibits B, C, D and E?

A It would have been our accountant, Mr. Hoffman.

Q Is Mr. Hoffman a public accountant?

A Yes.

Q Is he employed on a regular basis as an employee of American IBC Corp.?

A No, he would come in once a month to do our books.

Q Is Mr. Hoffman a lawyer?

A No.

Q Looking at Exhibit E, Mr. Silverston, that entry on Exhibit E, loans payable, June 1, is that correct, Wells Fargo Bank NA?

A No, we didn't owe anything to Wells Fargo Bank NA.

Q Did you owe anything to Wells Fargo NA due November 9, 1973?

A No, we did not.

Q Do you know where the accountant obtained any information concerning these transactions?

A I can only tell you what our procedures were.

Q Can you tell us what your procedures were?

A The accountant would come to the office, I would try to give him a copy of any correspondence relating to a specific transaction. We kept it in a separate folder normally that he would pick up when he came to the office. If he had any questions he would ask me a question. I would describe a transaction to him. With the clearing transactions in particular they were very complex and sometimes when I had the time we would spend a good deal of time together. If I had a little time I would say it was similar to another transaction, read your notes.

Q Did you read the originals of B, C, D and E after they were posted for the books?

A I did not.

Q The first time you saw it was approximately two months ago?

A Within the last two months. As a matter of fact, it was less time than that.

Q Did you have any conversations with the accountant concerning these transactions?

A No particular conversations. He had an outline from my letters to Wells Fargo.

Q Mr. Silverston, Ishow you Exhibit A --

THE COURT: You say no particular conversation?

THE WITNESS: Your Honor --

THE COURT: I am asking for your recollection, not for your conclusions. Do you recall having had a conversation about these two million dollar transactions with Mr. Hoffman?

THE WITNESS: No, I don't, your Honor.

THE COURT: At no time?

THE WITNESS: I don't recall any conversation. He may have asked me a question about them, but I don't recall.

THE COURT: Was there anybody else in the office other than you who handled any aspect of these $2 million loans?

THE WITNESS: Yes.

THE COURT: Did anybody else handle any of the arrangements that you made with any of the banks involved?

THE WITNESS: No, I would generally speak to the banks myself and specifically in these cases I did.

THE COURT: So that the only source of information for Mr. Hoffman would be the papers that you handed him and whatever you may have said to him?

THE WITNESS: That is correct, your Honor.

THE COURT: What is Mr. Hoffman's full name?

THE WITNESS: Milton Hoffman.

THE COURT: Where does he practice accountancy?

THE WITNESS: He did practice in New York. He is retired. I believe he is living in Florida. I could get the address for you.

THE COURT: How long had he been connected with you or your enterprises?

THE WITNESS: From the inception of American IBC.

THE COURT: Did he certify your annual reports or reports you filed with banks?

THE WITNESS: Yes, he did, sir.

THE COURT: Did you prepare any kind of a certified statement for any bank as at the end of May or June of 1973?

THE WITNESS: No, sir.

THE COURT: Was there any such report or statement certified by Mr. Hoffman for any period in 1973?

THE WITNESS: No, sir, the last certified report was May 1972.

MR. MILLER: That is Exhibit 50, your Honor.

THE COURT: Go ahead.

Q Mr. Silverston, I show you Exhibit A, Defendant's Exhibit A, which is a photocopy of the letter from Wells Fargo Bank International dated May 2, 1973, addressed to you and signed by Mr. Boland. This exhibit has at the bottom of it agreed by and then there is handwritten American IBC Corp. and then another by and your signature, you testified.

A Yes.

Q Mr. Silverston, do you recall signing that document?

A No, I don't, but that is my signature. It looks like my signature.

Q Do you know when you signed it?

A No, I don't.

Q Did anybody request that you sign it?

A The letter itself requested "Kindly execute the enclosed documents and return same to us. If you agree with the above details kindly" --

THE COURT: What you are saying is that the letter itself requested and then you read a statement from the letter. Will you read it slowly so the reporter can put it down?

A "Kindly execute the enclosed documents and return same to us. If you agree with the above details please confirm by signing the enclosed copy of this letter and return to us."

Q And the enclosed documents, Mr. Silverston, were what?

A Well --

Q Exhibit 5, the promissory note and Exhibit 6, the advance account agreement, is that correct?

A That is correct.

THE COURT: Wasn't a copy of the letter itself enclosed for your signature so that you could return the letter itself?

THE WITNESS: I don't recall. I might have made a photocopy or had a photocopy made. I don't recall if it was sent to me in duplicate.

Q Is that your printing?

A Yes, it is.

Q That is your printing?

A Yes, it is.

Q American IBC Corp.?

A Yes.

Q To the best of your recollection it wasn't on that letter when you received it?

A That is correct.

Q Mr. Silverston, Exhibit 21, can you tell us exactly what this book is?

A This is a notebook that I would keep as a combination calendar notebook which I wrote in sporadically. I would generally put down dates -- in the future if I made an appointment with someone two or three days or a week subsequent I would note it in my book. If it was for the same day I generally wouldn't note it. If there was a particular -- something I wanted to discuss with somebody that was coming in with three or four subjects to be covered I might jot down three or four subjects to cover with them. It's something I kept as a reminder and I didn't use it religiously, I used it sporadically.

Q Did you make any notation of your telephone conversation with Mr. Lilien that you testified to on cross-examination?

A I don't know.

Q Look at December 11. This is page 62.

A Yes, I made a notation.

Q What did you say?

A Chuck Lilien not sure Wells secured.

Q Did you make that contemporaneously with your telephone conversation or at or about that time?

A At about that time.

THE COURT: Can I see that Exhibit A, please.

Q On November 19, 1973 you testified you met with Mr. Boland. Was that your first business appointment of the day?

A Yes, it was.

Q How do you know that?

A I went directly to my office. I arrived in the office normally between a quarter of 8, 8 o'clock, 8:10. It was my first appointment of the day. I saw no one else that day other than the office people and I went directly from the office --

Q Where were the offices of American IBC?

A 770 Lexington, corner of 60th Street and Lexington.

Q And the office of Wells Fargo Bank International?

A 40 or 44 Wall Street. I don't recall which now.

Q Do you recall how you traveled there?

A By taxi.

Q I show you page 30 of Exhibit 21. The

reference at the top, "Bill Boland," does that have any significance to you?

A Yes, that would be mine. I wrote it on the top when I first made the appointment. It would be my first appointment. If there would be an appointment later on that I would have to remember it would be appearing toward the middle of the page.

Q By the way, you had lunch with Mr. Boland on that day?

A Yes, I did.

Q Was anybody present at that lunch?

A No, someone may have stopped at the table for a drink but no one else had lunch with us that I recall.

MR. MILLER: No further questions of this witness, your Honor.

THE COURT: You may step down.

MR. STEWART: Just a few questions, your Honor.

THE COURT: Go ahead.

RECROSS EXAMINATION

BY MR. STEWART:

Q I show you Defendant AF for identification, a letter dated October 30, '72 from Marshal Walker to you.

A Yes.

Q Do you recall receiving that letter from Marshal Walker?

A I sure do.

Q I show you Defendant Exhibit AG, a letter dated November 3,1972 from you to Marshal Walker. Did you write that letter?

A I believe I did. This appears to be the letter that I wrote. It's a rather long letter.

Q Is that your signature?

A There is no signature.

Q S.S., is that you?

A That would be me.

Q Did you write it?

A I believe I did. That appears to be a letter that I wrote.

Q Would you read the language on the third page that I have marked in red.

A "I think I should further comment on the relationship between Luis and Gonzalo and myself. Obviously Luis and Gonzalo are related by marriage. Where does Silverston come in? I consider Luis and Gonzalo as part of the Silverston family. Helene (and me too) has the same feeling for Inez and Liliana.

Without expression and words Gonzalo and Luis, I hope Inez and Liliana have the same feeling for Helene and myself. We, Gonzalo or Luis or myself, speak for each other. You are aware I am sure that Gonzalo and Luis are both officers of American IBC Corp. What Luis or Gonzalo says or commits to is a commitment by me and what I say is a commitment by Luis or Gonzalo. What I am trying to portray is that we are basically interchangeable. There are no other two men in the world in whom I have so much faith and trust."

MR. MILLER: Can we have the date of the letter?

A November 3, 1972.

"This goes further than business sense, this is a personal sense. As you know, talk is cheap. Much gossip and rumors we just disregard. However, the rumor mongers in Bogota certainly touch a sensitive point when untrue and damaging allegations are made. I sincerely doubt that Gonzalo ran around Bogota and said he bought Banco Nacional. I have not discussed the point with him, but if he did it is all right with me because, as I said above, whatever commitments and statements are made either by Gonzalo or Luis with regard to IBC I think I will stand behind.

Is that the portion you wanted read?

Q Yes.

You sent blind copies of Defendant's Exhibit AG to Mr. Gonzalo Ospina and Mr. Luis Lara, did you not?

A Yes.

MR. STEWART: I believe you and I have the same stipulation on Defendant's Exhibits as on the ones you introduced, that is stipulation as to admissibility --

MR. MILLER: I don't know what you propose to offer. I know you saw all of our exhibits, I am not sure I have seen all of yours. I would like to look at them. You have produced documents that I never saw before.

MR. STEWART: They have all been shown to you at one time or another.

THE COURT: It is a simple matter. If you have them in your hands give them to him.

MR. MILLER: I don't object to these.

THE COURT: All he is asking you is whether the documents that have been marked thus far by the defendant --

MR. MILLER: I don't know what's been marked. He is up to AF which means there are quite a few of them.

THE COURT: Get all of the documents that you have marked, hand them to Mr. Miller, let him take three minutes to look at them to see whether he questions their authenticity. If not they will be received in the same way as his exhibits were received subject to their relevancy and materiality. Do you have all of them collected together?

MR. STEWART: I believe so, yes, sir.

THE COURT: All right. Show them to him.

MR. MILLER: I make the same stipulation.

THE COURT: The documents are all received, referring to Defendant's Exhibits A through AG.

(Defendant's Exhibits A through AG received in evidence.)

xx

THE COURT: When you get an opportunity to will you please supply me with a defendant exhibit index. Also with copies for my set. You keep the originals.

Do you want this witness any further?

MR. STEWART: Just one further question, your Honor.

No, your Honor, no further questions.

REDIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Silverston, in June, 1973, did American IBC Corp. have any other time deposits other than the time deposit at the United California Bank and Wells Fargo

Luxembourg?

A I don't believe we did.

Q Do you recall what the cash balances of the company were at that time?

A In June?

Q June of 1973.

MR. STEWART: Cash balances of what?

MR. MILLER: American IBC Corp.

A We had no ready cash to speak of. I don't recall what the balances were.

Q Were the attachments -- do you recall when the attachments in the United Brands lawsuit was served upon your bank?

A Some time in June, 1973.

MR. MILLER: Thank you.

THE COURT: Thank you.

(Witness excused.)

THE COURT: Next witness.

MR. MILLER: I call Mr. Boland.

WILLIAM F. BOLAND, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q What is your occupation?

A International Banking. I was a VP, administrative president, of Wells Fargo Bank International.

Q Are you presently employed by Wells Fargo Bank International?

A No.

Q Are you presently employed?

A No.

Q When were you employed by Wells Fargo Bank International?

A From February 2, 1970, through April, 1974.

Q April, 1974?

A Yes.

Q During the year 1973 were you an officer of Wells Fargo Bank International?

A Vice president.

Q What were your responsibilities?

A As the administrative manager it was more of a liaison, trouble shooter, overseer in charge of the credit department, internal auditors, backing up the areas of the Far East, Latin America, European, multi-national and also backing up the office completely as the second man when Mr. Lilien was out of the office.

Q So is it fair to say, Mr. Boland, that you were second in command at Wells Fargo Bank International?

A I would say that.

Q Who did you report to?

A Mr. Lilien.

Q Were there employees who were responsible to you?

A I had employees responsible to me, yes.

Q How many employees?

A Approximately 12 directly responsible to me.

Q Were some of those employees officers of the bank also?

A Yes.

Q What was your relationship to American IBC Corp.?

A I was the officer of the account to review financial offerings submitted to our bank or to Wells Fargo Bank International for financing if we approved.

Q Did American IBC Corp. maintain an account or accounts with Wells Fargo Bank International?

A They maintained a demand deposit account, nothing worthwhile, mimimum figures, low three figures.

Q Prior to May of 1973 did American IBC Corp. do business with Wells Fargo Bank International other than the main deposit account?

A Yes.

Q What type of business was that?

A Letter credit transactions.

Q What type of transactions?

A We issued credit on behalf of American IBC to people in Colombia. In other words, we lent our credit for their credit.

Q For the credit of American IBC Corp.?

A That's correct.

Q In doing that did Wells Fargo Bank International make any investigation as to the financial capability of American IBC Corp.?

A We had the usual information in credit files, balance sheets, bank credit checkings, reports that we would receive if we had any, normal procedures that any responsible banker would go through when dealing with a client on an offering basis.

Q And on the basis of those reports you extended credit to American IBC Corp.?

A On the basis of his financial statement are you asking about?

Q Whatever documents you had in the file.

A On the offering basis we did not rely on his financial statement.

Q What do you mean by an offering basis?

A It was transaction per transaction. We would review the transaction if we felt we could secure the transaction and did have a secured transaction we may agree to take it on off consultation with other parties in the bank and also with our people in San Francisco.

Q When you say on an offering basis, you mean for example Mr. Silverston as the chief executive of American IBC making an offering to the bank on a proposition, is that correct?

A That's correct.

Q Wells Fargo Bank International, is that a separate corporation?

MR. STEWART: Separate from what?

MR. MILLER: Separate from Wells Fargo NA.

A I don't believe honestly I can answer that. I am not that familiar with the overall organizational structure.

Q How many years were you employed by Wells Fargo Bank International?

A Four years.

Q Subsequent to your employment with Wells Fargo Bank International, Mr. Boland, have you been employed?

A I was employed by Algemene Bank Netherlands ND New York branch, foreeign agency, 20 years.

Q But subsequent to your leaving Wells Fargo

A After I left, I'm sorry. Yes, I was employed by Banco Urquilo SA.

Q For how long?

A 11 weeks.

Q When did you leave that bank?

A November, 1974.

Q Did you leave Wells Fargo Bank International? Were you discharged?

A I believe I would say a mutual agreement.

Q What is your educational background?

A BS, Bachelor of Science in business and finance, minor in accounting.

Q Do you have any legal training?

A No legal training.

Q Do you have any sort of consulting agreement with Wells Fargo Bank International?

A Yes, I have.

Q You have a consulting agreement?

A Yes.

Q When did you enter into that consulting agreement?

A Not a written agreement. I'm sorry, what do you mean by consulting agreement?

Q Any agreement oral or in writing pursuant to which you are paid compensation.

A To be a witness for Wells Fargo Bank International I am being paid compensation.

Q When was that agreement entered into?

A I don't recall the date, some time in the latter part of 1974, I believe.

Q Was it during the summer of 1974?

A It could be. I really don't recall the date. I know it was after I had left the bank and prior to my joining Banco Urquilo which is August. Yes, December, '74, would probably be right.

Q Pursuant to that agreement does the Wells Fargo Bank International furnish you with attorney's services?

A There is an attorney sitting at the table. They are the attorneys for the bank.

Q Did Mr. Stewart and his firm represent you?

A Mr. Stewart and his firm are representing me.

Q Is that agreement in writing?

A That is not in writing.

Q It is not in writing?

A That's right.

Q How are you compensated?

A I am paid by the hour, the time that I come into the city and review facts.

Q That agreement is still in full force and effect today?

A Yes, it is.

Q Mr. Silverston, I show you --

A Mr. Boland.

Q I'm sorry, Mr. Boland, force of habit.

I show you Exhibit 1. Do you recall receiving the original of that letter?

A Yes, I do.

Q Using your phraseology, is tht an offering?

A This was to confirm an offering and the confirmation of the agreement is incorrect.

Q Did you tell Mr. Silverston that the confirmation was incorrect?

A Yes.

Q What did you say?

A I told him this is not exactly what we had agreed to on that transaction. He mentioned he would write me another letter and I told him at the same time I would write him a letter and for he to confirm back to me on the copy of my letter.

Q Tell us, Mr. Bolen, what was incorrect about this document, Exhibit 1?

A The Swiss francs were to be delivered to Swiss Credit Bank for account of Luxembourg to be placed in a time deposit with them for Luxembourg. It does not say American IBC.

Q You told that to Mr. Silverston?

A Yes.

Q How did you tell him that?

A Just as I mentioned to you before, the terms and conditions that I had agreed to --

Q How, was it person to person?

A By telephone.

Q Did you discuss that letter with anybody at the bank?

A No, I did not.

Q Exhibit 1?

A No, I did not.

Q So you received Exhibit 1 and you telephoned Mr. Silverston?

A That's correct.

Q And was that the entire conversation that you had with Mr. Silverston?

A I mentioned to him that I would send to him a copy of a letter that I thought was in agreement with our conditions for financing this transaction and requested that he sign a copy if he agreed. Which he did and sent back to us a signed copy.

Q Did you thereafter prepare a letter?

A Yes, I did.

Q I show you Exhibit 2. Is that the letter you prepared, Mr. Boland?

A Yes, it is.

Q After you had your telephone conversation with Mr. Silverston on or about April 30, 1973, is that correct?

A That would be approximate, between April 30th and May 2nd,probably May 2nd.

Q What did you do after you had the telephone conversation?

A I dictated a letter.

Q Did you discuss it with anybody in the bank?

A I had prior discussions with our people in Wells Fargo Bank San Francisco aboutthe possibility of this transaction. I had discussions with our people in the bank, Mr. Lilien, on the transaction. This was the final stage we had agreed and we had the confirmation and we were willing to go ahead.

Q So you discussed it with Mr. Lilien and Mr. Lilien is the executive vice president of Wells Fargo Bank International?

A Yes.

Q Did you discuss it with anybody else in Wells

Fargo Bank International?

A In the initial stages of this transaction --

Q After your telephone conversation with Mr. Silverston.

A No.

Q But you did discuss it with Mr. Lilien?

A Yes, I did.

Q Who in San Francisco did you discuss it with?

A Mr. Nelson Alexander.

Q Who is Mr. Nelson Alexander?

A Credit officer in San Francisco for Wells Fargo Bank NA.

Q What was your conversation?

A Outlining a description of the proposal, what our proposal would be and we recommended a transaction if they agreed and they also agreed.

Q How did you discuss that with Mr. Alexander?

A The same way that I have it outlined in the letter.

Q Was it by telephone?

A By telephone.

Q Did you confirm it in writing?

A No.

Q Did you write a memorandum in the file?

A No.

Q There is no written document that demonstrates this conversation or evidences this?

A That's correct.

Q Is it your regular practice to have telephone conversations with people at the national headquarters and not record them?

A It is my practice.

Q It was your practice at that time?

A That's right.

Q But you recall having that conversation with Mr. Alexander?

A Yes, I do.

Q Tell me exactly, to the best of your recollection, Mr. Boland, what you said to Mr. Alexander.

A We have a proposal for American IBC for $1,000,000 which we probably can arrange for a time deposit with Luxembourg or for Luxembourg. The funds upon maturity at the time deposit are remitted back to New York which will liquidate the loan. Our interest rate will be 8 per cent.

Q That is the entire conversation you had with him?

A Yes.

Q What did Mr. Alexander say to you?

A "It sounds good, okay."

Q Did Mr. Alexander have some sort of lending authority?

A I believe so.

Q What was his lending authority?

A I have no idea.

Q Did you have any lending authority?

A Half a million dollars, approval authority.

Q If it was above a half million?

A Mr. Lilien.

Q Would Mr. Lilien have to sign anything or authorize the event?

A No.

Q Did you have a conversation with Mr. Lilien?

A Yes.

Q What did you say to Mr. Lilien?

A I outlined the transaction.

Q Tell me what you told him not what you outlined.

A We had a proposal from American IBC to finance $1,000,000, to lend $1,000,000 which would be placed on a time deposit in favor of Luxembourg. Upon maturity of time deposit the funds would be remitted back to us in New York which we would be instructed to liquidate our loan, and so forth, with a secured advance.

Q You said secured advance?

A Yes.

Q Is Mr. Alexander a lawyer?

A I have no idea of his educational background.

Q Prior to this transaction, Mr. Boland, had you engaged in this type of business with American IBC Corp.?

A No.

Q Had you ever engaged in this type of transaction with any other business entity?

A For Wells Fargo?

Q Yes.

A No.

Q So in the entire four years you were with Wells Fargo Bank International you never had this type of transaction before?

A That's correct.

Q That is your signature on Exhibit 2?

A That's correct.

Q And this letter is correct, Exhibit 2?

A That's correct.

Q Exhibit A bears the signature of Mr. Silverston as president of American IBC Corp. When did you receive Exhibit A?

A When did I receive it?

Q Yes. I might point out Exhibit A is exactly the same as Exhibit 1 except for -- I'm sorry. It is the same as Exhibit 2 except for the fact that it says agreed to.

A I would say we received it on or before the 3rd.

Q Of May, 1973?

A Or the 2nd, I believe.

Q Do you have a stamp at the bank when you receive papers?

A The bank has a stamp, yes, sir.

THE COURT: You haven't given the witness Exhibit A, have you?

MR. MILLER: That is what we are looking for.

THE COURT: Here is a copy of Exhibit A.

MR. MILLER: I have it now, your Honor.

Q Does that exhibit, Mr. Boland, bear the stamp of the bank as to when it was received?

A No, it does not.

Q Look in the upper right-hand corner, sir. It says May 7, 1973?

A Yes.

Q Is this an original?

MR. MILLER: I never saw this until today but I assume that is a photocopy from an original. Does the bank have an original? I will make that request, rather than a photocopy.

MR. STEWART: We will look and see if we can find the original.

The original is not with us, we can get it sent down here.

THE COURT: All right. Bring it in tomorrow.

Q Mr. Boland, can you tell us whether that stamp, at the bank in the regular course of business, is put on correspondence or documents coming in?

A Yes, it is.

Q Is it fair to say that this document or the original of Exhibit A was received back in the bank on May 7, 1973?

A The copy of my letter, it would be fair to say based on the stamp on the letter of receipt that it was received on the 7th.

THE COURT: May 7th happens to be a Monday.

MR. MILLER: Yes, sir.

THE COURT: May 2nd was a Wednesday in 1973. Let me just check that to be sure.

MR. STEWART: That's correct, your Honor.

THE COURT: Yes.

Q Mr. Boland, after you sent this letter to Mr. Silverston, what did you do on behalf of Wells Fargo Bank International?

A We passed the necessary entries on the date as requested by Mr. Silverston. I believe that was May 3rd.

Q So that the advance was made on May 3rd, is that correct?

A I believe so.

Q And the $1,000,000 was advanced to American IBC Corp.?

A Yes.

Q And that is before you received Exhibit A back signed by Mr. Silverston, is that correct?

A That's correct.

Q What else did you do, if anything?

A When?

Q Somebody authorized the advance of $1,000,000. Was that you?

A Right.

Q How did you do that?

A I initiated an offering sheet and the instructions to our operating department to handle the final stages of the work, the operation of that side of it.

Q Is that standard operating bank procedures?

A Standard procedures.

Q I show you Exhibit 36. Is that a copy of what you call the offering sheet?

A This is a copy of our offering sheet.

Q And you prepared that, is that correct?

A It was prepared for my signature.

Q Who prepared it?

A One of the assistants in the back room. I can't tell you exactly who.

Q That is not your handwriting on that document?

A No, it is not. That is my signature.

Q In the lower right-hand corner?

A The lower right-hand corner.

Q Could you tell us on the left side it says "Reverse: See loan documentation check lists" and it appears to have an initial. It has an initial.

Q Do you know whose initial that is?

A No, I do not. I do not recognize the initial.

Q What is the source of the information contained in Exhibit 36?

A My own conversation with either Mr. Jean Jacque Fichou and/or somebody else in his absence. I don't recall exactly who I talked to in the operation side of that thing.

Q This Exhibit 36, Mr. Boland, bears a stamp, a time stamp which says May 3, 1973, and I take it that is 11 A.M.

A That's correct.

Q What does that signify?

A The significance is the operation section of Wells Fargo Bank International received my instructions at 11 A.M., May 3, 1973.

Q So that the money would have been advanced at or about that time?

A During the course of May 3rd, during the day.

Q After 11 A.M.?

A Yes.

Q What was the loan documentation?

A The offering sheet, a promissory note and an advance account agreement.

Q You signed this on May 3rd?

A Yes, I did.

Q What did you do after you executed that document? That is Exhibit 36.

A I went back to my office.

Q What did you do with that document when you took it back to your office?

A This document was not taken back to my office. I do believe I mentioned I gave the instructions to the operations section. This document stayed with operations.

Q You gave the instructions and you executed Exhibit 36. What did you do next?

A Then I went back to my office.

Q Did you do anything in connection with this transaction?

A No, sir.

Q As far as you were concerned it was finished?

A Yes.

Q By the way, Mr. Boland, referring to Exhibit 1, did you have any conversations with Mr. Silverston as to the drafting of Exhibit 1, the language to be used?

A My conversations relating to your Exhibit 1 and the transaction for $1,000,000 was all completed and agreed to by -- orally by telephone, by myself and Mr. Romano. Mr. Silverston wrote the letter.

Q Listen to my question please, Mr. Boland.

Did you have anything to do --

THE COURT: Who was Romano connected with?

THE WITNESS: American IBC.

Q Was he an officer of American IBC Corp.?

A An employee. As I believed, an employee.

Q Isn't it a fact that according to the records of the bank Mr. Romano was an officer of the corporation and Mr. Romano introduced American IBC Corp. to Wells Fargo Bank International?

A My recollection or my knowledge?

Q Your knowledge.

A One, I have no knowledge whether he was an officer of American IBC Corp. Number 2, I have no direct knowledge that he had introduced IBC to Wells Fargo Bank.

Q Did you ever read the documents in the bank files?

A Yes.

Q Did you read the CR39?

A Yes.

Q What is the CR39?

A CR39 is a credit officer's report on the credit standing of clients.

Q Does that normally list the officers of a borrower?

A Yes, it does.

Q I am asking you the question whether it was Mr. Romano or Mr. Silverston. Did you aid or assist in the drafting, the language incorporated in Exhibit 1?

A No.

Q Was this offering read to you on the telephone?

A No.

Q The first time you saw it was when it came in the mail?

A Yes.

Q You had a conversation with Mr. Romano concerning that?

A Yes.

Q Exhibit 1?

A No. No conversation with anyone except Mr. Silverston on Exhibit 1. The contents of Exhibit 1.

Q Did you talk to Mr. Silverston or Mr. Romano concerning Exhibit 1 before it was received by you? The substance of Exhibit 1.

THE COURT: He already testified he discussed it with Mr. Romano and Mr. Silverston is the author of the document and he told Silverston that it didn't conform and that he would send him one that did conform and if it did conform to please sign it and send it back which was done.

Let's go on.

Q Mr. Boland, do you know what a pledge is?

A In what form?

Q What is your understanding of a pledge?

A I can pledge allegiance to the flag. Security pledge?

Q Yes.

A Security agreement, pledging certain types of security.

Q What is a pledge of security?

A That they have agreed that these securities are turned over to you on behalf of the corporation for credit that you may extend to the individual. That is layman's terms.

Q What was turned over to you, to Wells Fargo Bank International pursuant to Exhibit 2?

A As requested in your letter of April 30th -- Swiss franc time deposit.

Q Swiss franc time deposit was turned over to Wells Fargo Bank International?

A Pledged as collateral.

Q It was pledged to you?

A Yes.

Q Other than the documents, Exhibit 2, the promissory note and the advance account agreement, did Wells Fargo Bank International receive any other documents in connection with the transaction of May 2, 1973?

A Not that I recall.

Q So it is your testimony, Mr. Boland, that the pledge was a pledge of a time deposit, is that correct?

A That's correct.

Q Do you recall testifying in an examination before the Bankruptcy Court on July 1, 1974?

A Yes, I do.

Q Do you recall these questions:

"Q Mr. Boland, you said that the arbitrage transactions were different in that they would be confirmed in writing, is that correct?

"A No, I did not.

"Q What did you say?

"A I said one transaction was confirmed by letter.

"Q Why is this different?

"A Because we entered into a different type of transaction whereby we were now relying on the security of an international foreign exchange contract rather than relying on a confirmed letter of credit from New York Bank."

Do you remember that?

A Yes, I do.

Q What was the pledge, the time deposit account or the foreign exchange contract?

A The foreign exchange contract gave rise to the time deposit account. You have to take the whole realm into one and it all becomes one. The dollar equivalent from the time deposit becomes part of it also and the dollars is what is utilized to pay the loan. It's all one to the other. The Swiss franc time deposit has to have a Swiss franc foreign exchange contract.

Q Did you have a copy of the Swiss franc foreign exchange contract?

A I don't recall.

Q Did you receive it at the time of the letter of May 2, 1973?

A Confirmation of the time deposit or the acceptance of the time deposit was agreed upon by Wells

Fargo Luxembourg.

Q I beg your pardon?

A Wells Fargo Luxembourg had the time deposit on Swiss Bank.

Q That is right.

Continuing, Mr. Boland, in your examination before the bankruptcy court from the answer that I just read:

"Q So you would then confirm in writing, is that correct?

"A That is right.

"Q Why didn't you confirm both agreements in writing"-- referring to the May 2, 1974 and the May 15, 1974 and turning to page 67 and you stated, Mr. Boland:

"A The real reason why we do not have to confirm an international foreign exchange contract in writing is because it is a contract between banks. Foreign exchange trading deals with international contracts. Banks rely on the contract. The instructions are given to the banks and they should have the knowledge to know what bank is involved so therefore we thought although we would like to have it in writing, we did not. But the information on file shows that the banks involved knew that Wells Fargo Bank International had a security interest in these transactions under the foreign exchange internatinoal regulations."

Do you remember that answer?

A I somehow recall it, yes.

Q What were the foreign exchange international contract regulations that you referred to?

A I think it's a fair use of words on my part. I do not know what the foreign exchange international regulations are. I believe it was my intent to state that the completion of foreign exchange contracts would be complied with and, therefore, we had a security interest.

Q So you were relying upon the terms of various-- three contracts were being performed?

A As a normal procedure the execution of all forms in theprocedure was relied on.

Q You were relying on the execution of the terms and provisions of the contract?

A I agree, yes.

Q Between May 3, 1974 and May 15, 1974, you took no further action in respect of the first transaction?

A That is correct.

Q I show you, Mr. Boland, Exhibit 9, the letter from American IBC Corp. dated May 15, 1973. Is that the offering on the second transaction?

A Yes, itis.

Q When you received that document, Exhibit 9, it's directed to your attention?

A That is correct.

Q Do you know if the original thereof bears the stamp of the bank?

THE COURT: What stamp of what bank?

MR. MILLER: Receipt stamp.

A I don't recall.

Q Is it the regular practice of the bank to stamp incoming documents at the time of receipt and date?

A In the normal course of business it is supposed to be the procedure.

Q When you received correspondence and documents, Mr. Boland, who opened the envelope?

A The secretary.

Q And she brought it in to you?

A She would bring in the morning mail.

Q It was her duty to stamp the date on it?

A Yes.

Q When you received Exhibit 9 what did you do?

A I read it and completed another offering sheet.

Q Did you have any discussion with Mr. Silverston or Mr. Romano or anybody concerning that document, Exhibit 9?

A Concerning the transaction? When was the transaction initiated?

THE COURT: He is asking you about concerning the prosecontained in this paper.

THE WITNESS: This was agreed upon prior to Mr. Silverston writing this letter.

THE COURT: He wants to know whether you were a co-author of the words that appear here or whether you, and I suppose whether it was merely as a result of a conversation or was it part of what you dictated, that is what he is asking you.

THE WITNESS: I was not a party to it.

Q But you had a conversation with Mr. Silverston before you received Exhibit 9?

A Yes, I did.

Q During that conversation you agreed upon the substance of the second transaction?

A The substance, yes.

Q And you told Mr. Silverston to send you an offering, is that correct?

A I told him to put it in writing.

Q And he sent you Exhibit 9?

A That is right.

Q And you received Exhibit 9?

A Yes.

Q And it was acceptable to you?

A That is true.

Q And you prepared an offering?

A Yes, I did.

Q You prepared an offering statement?

A An offering sheet.

Q I show you Exhibit 31, is that the offering sheet?

A Yes, it is.

Q That is the offering sheet?

A That is the offering sheet.

Q Is that your signature?

A No.

Q Whose signature is that?

A That is Mr. Hawkins' signature.

Q Who is Mr. Hawkins?

A Vice president in charge of the multinational area of Wells Fargo Bank International.

Q Did Mr. Hawkins discuss this offering sheet with you?

A Yes, he did.

Q At the time, back in May 17, 1973?

THE COURT: I think if you moved off from the witness and give him a little breathing room -- try the lectern over there and you won't have any difficulty.

Q Did you have any discussions with Mr. Hawkins concerning that offering statement?

A Yes, I did.

Q When?

A 17th of May.

Q Where?

A Wells Fargo Bank International, in my office.

Q Who directed the preparation of that offering statement?

A I did.

Q Who prepared it?

A The same party who prepared the first one.

Q I want you, Mr. Boland, to compare Exhibit 36 and Exhibit 31. Are there any differences? That is other than the rates.

A And the days.

Yes, we refer to a letter -- on the offering sheet of May 17, the instructions say "Please note dated 5/17/73" -- I am sorry, it says "Promissory note dated 5/17/73 for $1 million payable on 11/19/73 to be sent letter from American IBC dated 5/13/73 outlining international transaction."

The offering sheet of May 3 says promissory note dated 5/3/73 for $1 million payable 11/2/73 sent to customer, Swiss francs 3,240,000, time deposit with WFB, Lux. ss collaterl.

Q In Exhibit 31, sir, there is no mention of collateral, is hat correct?

A That is correct.

Q Comparing Exhibit 2 to Exhibit 9, isn't it a fact that there is no mention of collateral in Exhibit 9?

A I am sorry, on Exhibit 9, instructions which we had agreed to with American IBC as part of our advancing $1 million American IBC states on November 19 upon receipt of the foregoing funds in our favor kindly debit our account $1 million, principal borrowing plus interest at 8.5 per cent for 360 davs, ie., $43,196.67 crediting the balance of the funds to our account with you.

Q Mr. Boland, is the word "collateral" appearing in Exhibit 9?

A It is inferred.

Q Does it appear in Exhibit 9?

A No.

2a

Q Does it appear in Exhibit 1?

A Yes, it does.

Q What conversations or discussions or what have you did you have with Mr. Hawkins concerning the offering statement of May 17 1973?

A Mr. Hawkins came to my office --

THE COURT: May what?

MR. MILLER: May 17, 1973, the one that does not mention collateral, Exhibit 31.

THE COURT: That is not an offering statement.

MR. MILLER: The witness described it as an offering sheet. It is the authorization to make the advance.

THE COURT: The authorization, yes, but this is not an offering statement from a customer.

MR. MILLER: No, your Honor. I am using his own terminology.

THE COURT: All right.

A Mr. Hawkins came to my office and mentioned to me that he had signed this in error, I should have signed it and I told him "George, that is okay, let it go through."

Q That was the entire conversation?

A The entire conversation.

Q Mr. Boland, after you had this conversation with

Mr. Hawkins concerning Exhibit 31, what did you next do in connection with this transaction?

A The offering sheet was submitted to our operating department.

Q That was to advance the moneys to American IBC Corporation, $1,000,000, correct?

A That is correct.

Q Did you do anything in connection with this transaction thereafter?

A No.

Q By the way, Mr. Boland, did American IBC Corp. sign a promissory note in connection with that transaction, May 17, 1973?

A Eventually they did.

Q Does the bank have a promissory note signed?

A I believe so.

Q Have you seen it?

A I did see the signed note.

Q I show you Exhibit 18, Mr. Boland, a letter from Wells Fargo Bank International dated August 3, 1973, addressed to Mr. Silverston from Mr. Hawkins. Does that refresh your recollection as to whether American IBC Corp. ever signed a promissory note?

A I believe I just said eventually we did receive the promissory note.

Q When was the last time you saw an executed promissory note on the second loan transaction?

A After August 3, 1973.

Q And to the best of your knowledge such a note is in the files of the bank today?

A It was. All the notes and documentation pertaining to that loan, especially the promissory note is returned to the client.

Q And the bank does not keep a copy?

A No.

Q Can you explain how the bank has a copy of the first note?

A I'm sorry, they may have a copy in the loan file.

Q Of the second note?

A I may have to change my statement and say the bank does not keep a copy but they may have a copy in the loan file.

Q Do you recall seeing it within the recent past?

A I don't recall.

Q Did you ever review any financial statements of American IBC Corp., examined them?

A I looked them over, yes.

Q Which statements did you look over?

A 1972.

Q What statements?

A Fiscal year end May 31, 1972, signed by Mr. Hoffman.

Q Exhibit 50, is that correct?

A Yes.

Q That is a financial statement which Milton Hoffman a Certified Public Accountant in Flushing, New York, has some sort of statement on, is that correct?

A Yes.

Q The fiscal year for American IBC Corp. ended May of each year, is that correct?

A That is correct.

Q Did you request any additional or current financial statements from American IBC Corp. in 1973?

A Yes, I did.

Q From whom?

A Mr. Silverston.

Q What did Mr. Silverston tell you?

A They were not ready at the moment.

Q Did you ask him what the condition of the company was?

A No.

Q You just asked him for a statement?

A Yes.

Q Did he ask you why you wanted the statement?

A No, he did not.

Q And you didn't tell him why you wanted the statement?

A Mr. Silverston knew that he was to submit an annual report when completed by his accountant to the bank every year.

Q When was he to submit it to the bank?

A As soon as the accountant finalized or completed the statement.

Q Did you ask him for such a report in June of 1973?

A I don't believe so.

Q Did you ask him in July, 1973?

A I believe I asked in August.

Q How many times did you ask?

A Twice.

Q Both in August?

A Once in August and then followed up two months later in September or October. In October, I believe.

Q You knew that the fiscal year end was May of 1973?

A Yes.

Q And you didn't ask for a financial statement until August of 1973?

A The first request possibly September.

Q Was the request in writing?

A No, by phone.

Q Did you ask Mr. Silverston why it was not ready?

A In my last request I did because the statement, as far as I can recall federal income taxes, he should have filed by at least September, 1973, his 1972 taxes and that would have a bearing on when his statement should have been ready. He told me that it was not complete yet and as soon as it was completed he would send it to me.

Q And that was satisfactory to you?

A That was satisfactory.

Q Did you have any concern about the financial condition of American IBC Corp.?

A No.

Q Didn't you testify in your examination that American IBC Corp. was not credit worthy?

A I said their statement was not worthwhile and we did not base our financing on their statement.

Q Mr. Boland, I show you Exhibit 29. Did you ever see an original or a copy of that exhibit?

A Yes, I did.

Q When did you see it for the first time?

THE COURT: What is the date of that?

MR. MILLER: July 28, '73, your Honor.

THE COURT: Has that paper been marked?

MR. MILLER: It is Exhibit 29, your Honor, a memorandum type document.

THE COURT: 29?

MR. MILLER: Yes.

Q When for the first time did you see that?

A On the 28th or the 29th of July.

Q Did you read it?

A Yes, I did.

Q Were you aware at the time that American IBC Corporation was having problems in Colombia, South America?

A I was aware that American IBC may have been having problems in South America from Mr. Lilien's memorandum of the 28th. He mentions while in Bogota I learned from Gustave Arango that there had been a problem between American IBC and Banco --

Q You don't have to read it, it is in evidence. You are aware of the subject matter of that?

A Yes.

Q Were you aware of it before the memorandum was received by you?

A No, I was not.

Q Did you have any conversation with Mr. Silverston after you received the memo?

A I most certainly did.

Q Where were those conversations?

A By telephone. I called Mr. Silverston. When I finally did reach him after some difficulty, I mentioned to him the memoranda that Mr. Lilien wrote and asked him what it was all about and Mr. Silverston informed me we had some problems but don't worry about it, it has all been solved.

Q Did you tell him that the Banco de La Republica feels that America IBC cannot be dealt with in confidence and has severed relations with them?

A I don't recall actually saying that.

Q The substance of that?

A The substance probably.

Q By the way, Mr. Boland, did you have a social relationship with Mr. Silverston?

A No, I did not.

Q Did you have lunches with Mr. Silverston?

A Yes, I did.

Q How often?

A Well, on the basis of one every three months or so.

Q Did Mr. Silverston ever give you any gifts?

A Yes, he did.

Q What kind of gifts?

A A case of Chivas Regal Scotch.

Q Just one case?

A At Christmas.

Q In 1972 or 1973?

A In 1972.

Q Mr. Boland, coming back to the first loan transaction, who is Mr. Lubonov?

A Mr. Lubonov is a vice president of Wells Fargo Bank International in charge of the European area.

Q I show you Exhibit 42, a copy of a telex dated April 20, 1973, did you ever see the original or a copy of that telex?

A Yes, I do.

Q Does that relate to the negotiations which you were conducting with Mr. Silverston or Mr. Romano concerning the arbitrage transaction?

A Yes, it does.

Q So those discussions were during the month of April, is that correct?

A Yes.

Q This is a telex from Wells Fargo Luxembourg to Wells Fargo Bank International, is that correct?

A That is correct.

Q Was there a response to that telex?

A I believe there was.

Q Have you seen it?

A I don't recall at this moment.

Q I show you Exhibit 44, Mr. Boland. Is that the response, a telex dated April 25, 1973, from yourself to Wells Fargo Luxembourg attention Mr. Chauviniere.

A No, it is not.

Q I show you Exhibit 46, a telex from you dated May 1, 1973, to Wells Fargo Bank Luxembourg attention Mr. Posniak, is that responsive?

A No, it is not.

Q Have you seen the response recently?

A I know there is a response by our operations department by sending a blank copy of our letter to Mr. Posniak.

Q A blank copy of your letter, what letter?

A My letter to Mr. Silverston outlining the transaction of May 1st.

Q The letter dated May 2nd?

A I believe May 2nd or May 1st.

Q That is the only response you recall?

A Yes.

Q Do you recall seeing Exhibits 46 and 44 though?

A Yes.

Q You sent those telexes?

A Yes, I did.

Q Incidentally, Mr. Boland, did you consult with any attorneys about these two transactions?

A No, I did not.

Q At the time they were made?

A No,I did not.

Q How long have you known Mr. Victor Romano?

A I became acquainted with Mr. Victor Romano some time in the '50s. He was working for a trading house and doing business with Algemena Bank Netherlands.

Q With whom you were employed at the time?

A Yes.

Q When you joined Wells Fargo Bank International did you do business with Mr. Romano again?

A No, I did not.

Q Did you know Mr. Romano was an officer of American IBC Corp.?

A I learned he was an officer or he was a member associated with Mr. Silverston of American IBC.

Q During the time that these two transactions were being negotiated and consummated in May of 1973 and April of 1973, Mr. Boland, did you have conversations with Mr. Romano? That is concerning these transactions.

A On the first transaction, the complete details of the transaction, the agreements were arrived at between myself and Mr. Romano by telephone. On the second transaction I had no conversation with Mr. Romano.

Q Did you have a relationship with Mr. Romano where he called you and visited you in New York?

A No, I did not.

Q Mr. Boland, I show you Exhibit 24 and ask you whether you received that letter dated July 24, 1973?

A Yes, I did.

Q What did you do after you received that letter?

A I filed the letter.

Q Did you speak to Mr. Romano?

A No, I did not.

Q Did you make any inquiry of Mr. Silverston or anybody else why Mr. Romano was severing his relationship with American IBC?

A No, I did not. I thought it was too touchy a subject. In fact, in my own mind I felt that Mr. Romano may not have been doing the right thing with American IBC. Since they were so very kind to him when he was ill with a heart attack in Europe I decided on my own not to bring the subject up or approach anybody on the subject.

Q Why was it touchy?

A There could be ill feelings between Mr. Silverston of American IBC and Mr. Romano since American IBC paid all hospital expenses and took good care of him when he had his heart attack in Europe.

Q That is the only reason you didn't tell him?

A Yes.

Q Do you know who Mr. Lara and Mr. Ospina was?

A I do not know them personally.

Q Did you know who they were?

A I know of them, yes.

Q Did you know that they were officers?

A Yes.

Q Did you know that they had severed their relationships with American IBC?

A No, I did not.

Q You didn't know that?

A No, I did not.

Q Did Mr. Silverston ever ask you on behalf of Wells Fargo Bank International to act as escrow agent or the bank act as escrow agent in connection with a compromise or settlement?

A I am not familiar with those details. Mr. Silverston, American IBC -- and I might say I take American IBC and Mr. Silverston as one. That is the way I looked at American IBC. It was Mr. Silverston. Everybody else was a figurehead. Any transactions we agreed to Mr. Silverston signed and he was the only one to commit American IBC.

He did send or he did talk about we acting as an escrow. I don't recall the date of the letter. I was not familiar with the details behind the letter. I received the letter, reviewed the contents and asked Mr. Silverston to take it to somebody else to handle it for him since our staff knowing our collection department were not geared to handle such a transaction.

Q By the way, in connection with the second transaction, May 17, 1973, did you talk to Mr. Alexander in Wells Fargo National in San Francisco about that transaction?

A I talked to Mr. Alexander.

Q And you outlined the transaction?

A Same procedure.

Q And he approved it?

A Yes.

Q Do you remember testifying about Mr. Romano and I quote from page 92: "Did you ask Mr. Romano why he resigned from American IBC?

"A No, I did not, that is his own prerogative.

"Q Weren't you concerned with a leading officer of the corporation?

"A No.

"Q You testified you dealt with him in the past and he had resigned.

"A I saw no reason why I should question Mr. Victor Romano as to why he left his job. Why should anybody question me as to why I leave my job."

Is that any different from your testimony now?

A Not really.

Q Did the bank have in its files Dun & Bradstreet reports on American IBC?

A Yes.

Q Did you read those Dun & Bradstreet reports?

S Yes, I did.

Q Mr. Boland, I show you Exhibit 26. Would you identify that report please. Tell us what that document is.

A It is a CR39 report to a Wells Fargo Bank which lists the amount less vacation collateral of advances that we may have granted to our client.

Q CR stands for credit report, am I correct?

A You are correct.

Q As part of that report are there extracts or portions of Dun & Bradstreet reports?

A Yes, there is.

Q Does that report reveal the resignations of Mr. Lara and Mr. Ospina?

A Yes, it does.

Q In the regular course of the discharge of your duties would you read the CR39 reports on your accounts?

A Yes, I would.

Q Did you read that report?

A Yes, I did.

Q When did you read it?

A Prior to signing it.

Q When did you sign it?

A I don't recall the date.

Q But your signature appears on that?

A Yes, it does.

THE COURT: Is there any date on the report?

MR. MILLER: October 31, '73, in the upper right-hand corner, your Honor.

THE COURT: Has that been marked?

MR. MILLER: Exhibit 26, your Honor.

THE COURT: I am looking for a copy. I don't know whether it's been submitted to me.

MR. MILLER: This is an additional copy, your Honor.

Q Mr. Boland, do Dun & Bradstreet reports come into the bank on a regular basis with respect to their accounts as to which there is a borrowing relationship?

A I believe they did.

Q When they came in in respect to your accounts did you have an opportunity to review them?

A Not unless I specifically requested the credit department to forward all the reports to me. The credit reports or D & B reports went to our credit department.

Q So that if a Dun & Bradstreet report came in automatically on American IBC Corp. it would not go to you, is that your testimony?

A That is correct.

Q Unless you requested the credit department to send it to you you would not see it?

A I would see it when the CR39 was prepared. I would have it attached as customary in order to send the things to San Francisco and it would be a part of the attachment.

Q How often are CR39 reports prepared?

A Annually.

Q Was a report prepared for American IBC in October of 1972?

A I believe there was.

Q Did you read that report?

A I believe I did.

Q Mr. Boland, you knew that there was a controversy in Colombia about the ownership of assets, did you not?

A I was aware that Mr. Silverston had a conflict, yes.

Q When were you aware of that?

A I don't recall the date.

Q Was it in June of 1973?

A Roughly around that time. I actually cannot recall the date.

Q But during the early part of 1973 you knew about it?

A I knew about it.

Q During the first three-quarters of 1973, once every couple of months you had lunch with Mr. Silverston?

A That's correct.

Q What did you discuss at lunch?

A Well, at one meeting we discussed our families. He mentioned some place back in the early part of '73 this problem with the Lara group, as I call them or as the bank called them and that he was having problems with the group. I asked him had he retained an attorney because the assets were in Colombia. He mentioned that yes, he had. He was trying for a settlement.

Q Did you discuss United Brands with Mr. Silverston?

A No, I did not.

Q You had no discussion with Mr. Silverston in June of 1973 or thereafter concerning United Brands suing American IBC Corp. and attaching its bank accounts?

A I was not aware of any lawsuit of United Brands with American IBC in attaching any bank accounts.

MR. MILLER: Could we have five minutes, your Honor?

THE COURT: All right.

(Recess.)

Q Mr. Boland, I show you Exhibit 15, a letter dated May 1, 1973. Do you recall receiving the original or a copy of that letter?

A Yes, I do.

Q Did you read it when you received it?

A Yes, I did.

MR. STEWART: What is the date of that?

MR. MILLER: May 1, 1973, a letter from American IBC to Wells Fargo Bank International, Mr. Boland.

MR. STEWART: What is the number?

MR. MILLER: Exhibit 15.

Q Mr. Boland, coming back to Exhibit 42, the telex dated April 20, 1973, I call your attention to item 2 in that telex, this is a telex from Wells Fargo Luxembourg to Wells Fargo International, attention Mr. Lobonov.

Did you see that telex when it came in?

A No, I did not.

Q Did Mr. Lobonov discuss that telex with you?

A No, he did not.

Q It is your testimony, Mr. Boland, that item 2 which reads I assume that this Swiss franc deposit placed with Lux will serve as collateral for a $1MIO loan made by yourself to your New York customer. In other words, we should not get involved in doing a swap Swiss franc/ dollars and provide the dollars one million.

Your testimony was that was responded to?

A Yes, it was.

Q And the response was a copy of the offering letter? That is the May 2, 1973, letter.

THE COURT: You didn't ask him that before.

MR. MILLER: I will ask him now.

Q Was that responded to?

A Yes.

Q How?

A My copy of my letter.

Q Your letter, May 2, '73?

A That's right.

Q Exhibit 2?

A Yes.

Q Mr. Boland, I show you Exhibit 43, a telex dated April 24, 1973, from Wells Fargo Bank Luxembourg to Wells Fargo Bank International, attention Mr. Lobonov.

Would you read the next to last paragraph before the "Thanks a lot".

A In the meantime we hope that you receive J.D. Chauviniere telex on the same subject, could you give him an answer on point 2 of this telex.

Q Was anything done in response to that?

A I don't know what Mr. Lobonov may have replied.

Q Did Mr. Lobonov discuss it with you?

A I do not recall.

Q Mr. Boland, I show you Exhibit 47 which is a telex from Wells Fargo Bank Luxembourg to Wells Fargo Bank attention Boland.

THE COURT: Datedwhat?

MR. MILLER: The date is May 3, 1973. I believe it has a stamp in the upper right-hand corner, New York Cable Department May 3, 1973, 9:24 A.M.

Do you recall receiving that telex?

A Yes, I do.

Q What did you do after you received that telex?

A I don't recall what I did.

Q Mr. Boland, would you describe to us what

Exhibit 30 is, a document dated May 18, 1973?

A Incorrect bookkeeping entries.

Q Describe the nature of the transaction reflected by that exhibit.

A These are bookkeeping entries, the top half of the Exhibit 30 starts off with New York, New York 5/1/1973, contract filed with an arrow pointing down to American IBC, the actual entry credit total commercial loans, loans underscored number 278010, AD, description of the entry, AD3662, American IBC Corp., revised entry of 5/17/73, value 5/17/73, $1,000,000.

Q What was the effect of that transaction, Mr. Boland?

A To correct an incorrect entry.

Q What was the incorrect entry?

A The wrong account had been debited.

Q Which account had been debited?

A Loans unsecured.

Q What was the correction?

A Loans secured, advance account.

Q What is the advance account? The advance account is the account maintained pursuant to the advance account agreement that was signed on May 2, 1973, by American IBC, is that correct?

A That's correct.

Q How did you know that American IBC had paid the hospital expenses of Victor Romano?

A Mr. Silverston said so.

Q Did you discuss the affairs of the corporate executives of American IBC with Mr. Silverston?

A No, this is something that Mr. Silverston just mentioned at a meeting I had at his office probably some time in late '71 or early '72 when he had invited me to lunch and I met he and Mr. Romano at his office and when we walked out he said doesn't Victor look well and I said Victor looks extremely well and he said he was very ill and he went on to discuss what he supposedly had done.

Q So you met Mr. Romano in 1972?

A I believe that is approximately when.

Q And you were introduced to him, I take it?

A Mr. Silverston knew that I knew Mr. Romano and said this is Mr. Romano, Mr. Boland.

Q Had you ever met Mr. Romano person to person before 1972?

A Back some time in the '50s.

Q And subsequent to that meeting in the American IBC offices in 1972 did you have occasion to meet with

Mr. Romano on a person to person basis?

A No, I did not.

Q Mr. Boland, on November 19, 1973, you met with Mr. Boland, is that correct?

THE COURT: Mr. Boland met with Mr. Boland?

Q Mr. Silverston.

A Yes, I did.

Q Who arranged that meeting?

A I did.

Q How did you do that?

A By telephone some time in October after I had received our maturity list of loans coming due. I noted that I had two loans we had granted, American IBC, were going to mature in November and the only transactions we had on the books and I thought it would be an ideal time to meet with Mr. Silverston to see about putting more business on our books.

Q Did you have any concern about the contracts being executed?

A None whatsoever.

Q You were still relying on the execution of the contract?

A Definitely so.

Q This was a telephone conversation?

A A telephone conversation.

Q And you say it was in October?

A In October.

Q Was it in the early part of October?

A The latter part of October.

Q You made an appointment with Mr. Silverston?

A I made an appointment for the first date that was mutually agreeable to both of us according to our calendars or according to what appointments we had. November 19th happened to be the date.

Q It had nothing to do with the fact that the second loan was returned?

A None whatsoever.

Q Did you have any conversations with Mr. Silverston between the date you made the appointment and November 19th?

A On November 19th Mr. Silverston called me to confirm a luncheon at which it embarrassed me quite a bit because I had not noted that we had made this arrangement for the 19th and I made a luncheon date with another friend of mine.

Q What did Mr. Silverston say to you and what did you say to him?

A He said is our luncheon date still on for today and I said yes.

Q What happened after that?

A I arranged with Mr. Silverston to meet him at the Bankers Club and I decided on my own to have lunch with both the friend and Mr. Silverston.

Q Did you break the other appointment?

A No, I did not.

Q Who was the other appointment with?

A I don't recall the other party at all. I have been searching my memory now for about three months. I still cannot recall.

Q It is your testimony, Mr. Boland, that Mr. Silverston did not come to the office of the bank?

A Mr. Silverston met me at the Bankers Club.

Q Where is that located?

A 120 Broadway with an entrance on the Nassau side which is a block and a half away from Wells Fargo and it is a stop on the Lexington Avenue subway.

Q What time did you meet with him?

A About 12 o'clock.

Q Was anybody else present?

A Myself and this friend of mine, the third party at the luncheon.

Q You don't know who that was?

A I don't recall.

Q Are you a member of the Bankers Club?

A Yes, I was.

Q Where did you meet, in the bar?

A We met in the lounge.

Q What did you do after that?

A We ordered one round of drinks and arranged to have a table set aside for the three of us. That was it.

Q Do you remember your examination again?

A Yes.

Q Page 87?

A Yes.

Q Do you remember the question:

"Q Do you recall whether or not you attended a meeting with various officials of the Wells Fargo Bank and Mr. Sheldon Silverston around November 19, 1973?

"A I had lunch with Mr. Silverston November 19th.

"Q Who was in attendance at that luncheon?

"A Just myself and he."

Do you remember the answer?

A I remember the answer as a faulty recollection on my part. I wish to correct it today.

Q You are sure of that?

A I am certain.

Q Mr. Boland, I show you Exhibit 49 which consists of three pieces of paper, photocopies. I call your attention--

THE COURT: Datedwhat?

MR. MILLER: Dated November 19, 1973, your Honor.

Q These are photocopies of bills from the Bankers Club?

A Yes, they are.

Q And the first document which has the prices in it, is that sent to you by the Bankers Club?

A Yes, it is.

Q Together with your bill at the end of the month or the beginning of the month, is that correct?

A Yes.

Q Looking at the second document, I take it, Mr. Boland, that is a photocopy of the back of those bills, is that correct?

A That's correct.

Q And the one on the right is the back of the luncheon bill?

A That's correct.

Q Is that your handwriting?

A Yes, it is.

Q What does it say?

A It says "S. Silverston, Victor Romano, American

IBC."

Q That's all it says?

A "Domican Republic deal and discussed other problems."

Q Was Victor Romano at that lunch?

A No, he was not.

Q Did you write Romano?

A Yes.

Q Why did you write that?

A When I got the statement at the end of the month I reconciled my account and I could not remember who it was. I know I had a friend there.

Q Victor Romano sounded like a good name?

A It sounded like a good name.

THE COURT: There is no doubt that the Blue Room charged you for a couple of guests that day. They charged you the usual two and a half dollars a head, two guests in addition to yourself.

THE WITNESS: That's right.

MR. MILLER: I believe Mr. Silverston testified somebody may have sat down at the table.

THE COURT: That was an expensive sitdown, two and a half dollars a seat.

Q Mr. Boland, I show you the third sheet. Can you tell me what the third sheet is?

A The third sheet is our luncheon menu.

Q And the only difference between that and the third sheet is that the prices are not on there?

A That's correct.

Q And the stamped date, the total, is that correct?

A Something happened to your machine because this is a copy of the same as this and this has the prices on it.

Q Do you know where the bank obtained the third sheet?

A I have no idea.

Q Do you know what it says on the back?

A No.

Q Does it say Warner?

A I cannot read it.

Q Is that your handwriting?

A No.

Q Did you ever see the third sheet of Exhibit 49?

A I never did.

MR. STEWART: I think one is a carbon of the other.

MR. MILLER: You tell me how it is a carbon when it has different writing on it.

THE COURT: Is that the name of the waiter, by any chance?

MR. STEWART: This is the same writing, the one in my right hand, as the sheet in my left hand. One is a carbon of the other.

MR. MILLER: One does not have the prices. I am asking where he got it from.

Mr. Ross tells me the third sheet was obtained from the Bankers Club.

Q Mr. Boland, what were the other problems discussed?

A The problem discussed was the original transaction that Mr. Silverston offered to me on the Dominican Republic. I wanted to know what happened and why we didn't enter into the transaction and why we could not do something more there, what happened to his influence.

Q Well, Mr. Boland, I ask you to read it again. It says "Dominican Republic dealand discussed other problem."

THE COURT: Is that a justification of an expense account or is that an actual occurrence? Was it because the bill ran up a little bit there that you had to make it sound important or was something else discussed?

THE WITNESS: No, your Honor, it was not. The bill in my estimation was not high for a luncheon at the Bankers Club with three people. I was looking for new business and that is why I made the notation, Dominican Republic deal, because Mr. Silverston said there was a possibility of doing something else in the Dominican Republic and the other problem was brought up by myself and that is what happened to the initial transaction which was a hydroelectric dam project as proposed for irrigation and the production of electricity. He is supposed to have had influential friends on this project and it was supposed to be going through. Actually there were two conversations, one the new one, two, what happened to the old one. It would have been very easy just to mention Dominican Republic.

Q Before you went to that lunch you had read the CR39, had you not?

A Yes, I did.

Q And you were familiar with the fact that the National Bank of North American had reported on a credit checking.We do not have a facility at the moment for the subject.In the past we have extended facilities on a secured basis. We cannot make any comment about our experience with the subject. You knew that?

A That's true.

Q Did you ask Mr. Silverston any questions about that?

A No.

Q It did not affect your thinking in connection with new business?

A No, it did not.

Q How long was that luncheon?

A Oh, I believe we broke up between 2:15 to 2:30. I don't recall exactly the moment that we broke up but--say, the latest 2:30.

Q You were with Mr. Silverston by your own admission from at least 12 to 2:30?

A That's correct, with my other guest.

Q You have no recollection at the present time that Mr. Silverston was at the premises of the bank earlier before lunch?

A He was not.

Q What did you do after lunch?

A I left Mr. Silverston at the downstairs entrance in the lobby of the Equitable Building and I went back to my office.

Q What did you do at your office?

A At my office I had told Shelly I would have Mr. Vanveerson look into his new transaction at the Dominican Republic. I went back to my office to discuss this matter with Mr. Vanveerson. In the meantime my operations people, as had been my practice in the morning of the 19th, I put them on notice we were to receive $1,000,000. They came to me and told me we had received

$1,000,000. I told them what bookings to make, went back to Mr. Vanveerson to see if he was free to talk with Mr. Silverston on this new transaction on the Dominican Republic. He was free. I then called Mr. Silverston some time between 2 and 3:30. I mentioned "Shelly, we received the million dollars," "Shelly, yes, Mr. Vanveerson is free, your date is set for tomorrow."

Q What booking instructions did you give your people?

A I just told them to follow the outline as stated in Mr. Silverston's letter, the $1,000,000 against the advance account, the 40 some-odd thousand dollars against the interest and the remainder to remain in Mr. Silverston's account.

Q The incoming money was deposited into the account of American IBC?

A Yes.

Q And the bank took whatever was due to the bank from that account, is that correct?

A That's correct.

Q What did you tell Mr. Vanveerson?

A During the conversation with Mr. Silverston he was talking about a possibility of doing business in the Dominican Republic and we would like to follow it up.

Q Is Mr. Vanveerson in the courtroom?

A Yes, he is.

Q Did you have any conversations with Mr. Lobonov?

A No, I did not.

Q Is it fair to say, Mr. Boland, at the end of the business day of November 19th you were satisfied with the relationship?

A Yes, I was.

Q Did you have any conversations with Mr. Lobonov the next day concerning American IBC?

A No, I did not.

Q How about the 21st of November? That is two days later.

A Not that I recall.

Q Did Mr. Lobonov have any relationship with American IBC?

A Mr. Lobonov knew Mr. Silverston through my intermediary. Mr. Silverston introduced Mr. Lobonov to a Shaker, Shcacker, whatever way he pronounces the name, and as far as I know that is what the relationship was.

Q Did Mr. Lobonov tell you on November 20th or November 21st that American IBC was in financial difficulty?

A No, he did not.

Q Mr. Boland, I show you Exhibit 25 and I ask you whether you ever saw the original or a copy of that letter?

A No, I did not.

Q What are your initials?

A WFB.

Q Doesn't the letter demonstrate cc: WFB?

A It does. I'm sorry, I didn't read it.

You are referring to the notation cc, carbon copy?

Q That's right.

A WFBLE?

Q WFB.

A LE.

Q That is Wells Fargo National?

A Wells Fargo Bank Los Angeles.

Q In this letter this is NDL, Mr. Lobonov's initials, Nikita Lobonov?

A That's correct.

Q He states, a letter addressed to Sunkist Growers, Inc., financial economist Dr. Stanley J. Forster, in light of the fact that American IBC New York is currently in financial difficulty you may wish to continue your inquiries about switch transactions with -- and he lists some other names.

Is it your testimony that Mr. Lobonov didn't discuss the financial difficulties of American IBC with you?

A Yes.

Q And you were the account officer for American IBC Corp.?

A That's correct.

Q And Mr. Lobonov is in charge of the eastern European area?

A Vice president Wells Fargo Bank in charge of the eastern European area.

Q And he had no discussions with you as the account executive on the American IBC account?

A That's correct.

Q Do you know how Mr. Lobonov knew American IBC was in financial difficulty?

A No, I do not.

Q Did you see Mr. Lobonov on November 19, 1973?

A I saw him in the office, yes.

Q Did you talk to him?

A No.

Q Is his office near yours or was his office near yours?

A Closely associated.

Q Did you speak to Mr. Lobonov on November 20, 1974?

A On American IBC?

Q Yes.

A No.

Q Is it the regular practice of the bank, Mr. Boland, to circulate documents and correspondence among a circulation list of officers or employees?

A Yes, it is.

Q What is included in the daily circulation?

A Letters written, what we call the green copies, letters written by the officers of the bank. If they wish one in circulation it goes in circulation.

Q Is it probable that the green copy of the letter Mr. Lobonov wrote was in a circulation?

A It is probable.

THE COURT: I don't seem to have that letter that you referred to.

MR. MILLER: November 21, '73, your Honor?

THE COURT: Yes. No copy was handed up to me on this.

Q Was there a circulation list listing the names of each officer to get whatever was in the circulation for the day?

A Yes, there was.

Q I assume Mr. Lilien was at the top of the list?

A Yes, he is.

Q Who was second?

A I don't recall whether I was second or not.

Q You are near the top?

A I was near the top.

MR. MILLER: I have no further questions of this witness.

THE COURT: Any cross?

CROSS EXAMINATION

BY MR. STEWART:

Q Referring now to Plaintiff's Exhibit 29, July 28, 1973, that memorandum directs you to ask Sheldon Silverston of American IBC for all the facts in the case as seen by him, isn't that correct?

A That is true.

Q Did you follow through on that direction, Mr. Boland?

A Yes, I did. I called Mr. Silverston. It took a little while before I could get in touch with him. When I finally did, which was about three to four weeks after my initial phone call I discussed with them Mr. Lilien's memorandum. He stated that there was no problem, he had taken care of it, it had all been resolved, not to worry about it. I asked Mr. Silverston if that is the case I would like to have in my own files and in writing proof that the problems that he had were resolved.

Q Did he comply with that request?

A He complied. He sent a letter down to us with the proof.

Q I show you Defendant's Exhibit X and ask you whether that is the letter that he sent you?

A Yes, it is. It says "Dear Bill: Per our conversation this morning attached to a copy of our letter from the National Bank of North America"--

THE COURT: What is the date of the letter?

THE WITNESS: September 6, 1973.

"2, a letter from Intercommerce Sofia. This refers to a settlement of a dispute between Banco de la Publica and ourselves, regards, sincerely yours, Shelly."

Q Would you read the two attached letters that are enclosed please.

MR. MILLER: They are in evidence. I don't know why the record has to be burdened.

THE COURT: I don't understand this procedure. What are you conveying to me? I am going to read every one of these exhibits anyhow.

MR. STEWART: Just the fact that Mr. Silverston provided documentary evidence to the effect that the whole problem had been solved.

THE COURT: He said he provided it and this is a document. Incidentally, that was not handed up to me either. I am going to have trouble with these exhibits unless you keep me apprised.

MR. STEWART: I thought we handed them up, your Honor. I'm sorry.

THE COURT: What is the date of the paper you have?

THE WITNESS: September 6th.

Q I show you Defendant's Exhibit W, Mr. Boland, and ask whether you have seen that?

A Yes, I have. It is a memoranda from Mr. Arango addressed to Mr. Lilion circulated in the office and it says "Only a short memo to inform you that subject settled the whole matter they have with Banco de la Republica and paid the outstanding letter of credit. It seems that the settlement was highly pressed by the Bulgarian Central Bank, best regards."

Q What is the date of the memorandum?

A September 4, 1973. My initial acknowledging receipt is up on the top where I signed my name.

Q With reference to Defendant Exhibit H, the May 2nd letter from Wells Fargo to Mr. Sheldon Silverston, I refer you in particular to the notation at the bottom, cc Mr.--

A Mr.Posniak, Luxembourg.

Q What does that indicate?

A That indicates that Mr. Jean Jacque Fichou sent a blind copy of our letter of May 2nd to Mr. Posniak Luxembourg.

THE COURT: I don't have a copy of that either.

MR. MILLER: Neither do I.

THE COURT: I have an idea that is one I gave back mistakenly on the notation that it was a duplicate but it seems to have something else that the other copies of the May 2nd letter do not have. I think I should get it back.

MR. STEWART: This one has the notation that it was sent to Luxembourg and a blind copy.

THE COURT: I have seen this one before.

MR. MILLER: The one with the blue inked notation?

MR. STEWART: Yes.

THE COURT: I will need a Xerox of that. Give it to me tomorrow.

Q What time was your luncheon appointment on November 19th at the Bankers Club?

A 12 o'clock.

Q With reference to the notation on the back of the sheet, Dominican Republic deal and other problems, can you describe the two different Dominican Republic deals that you talked about earlier in your testimony?

A The first deal that Mr. Silverston was proposing we did not go into full details. We mentioned it was the irrigation or the electrical work project. I just mentioned that that was out of my jurisdiction. If you are talking about Dominican Republic, something new, I would like to talk about the Latin American matter. The other deal, which I said too, was why we could not get the project loan on the hydroelectric plant. I had informed him through a source that I knew that the dam would never be built but there was a possibility that they could put through this whole project through turbine engines or turbine pumps, whatever they are called and why hadn't he followed up and why couldn't we get the transaction.

Q Was this a transaction that the bank was to finance?

A The bank would be involved in financing it, probably through XM Bank or FCIA. We weren't sure until we had more information.

Q Did Mr. Silverston go to the bank at all on November 19th?

A No, he did not.

Q Did you see Mr. Silverston on the 20th?

A Yes, I did. He was outside in the lobby some time between 11 and 11:30. I happened to leave my office to go back in towards operation and I noticed Mr. Silverston sitting in the lobby. We waved to one another. I came back to my office and Virginia, our receptionist called me on my phone to let me know that Mr. Silverston wanted to see me. I told Virginia there must be some mistake that he was here to see Mr. Vanveerson. He said well he would like a few minutes with you. I walked outside and showed him into my office.

Q Did you have a conversation with him there?

A Yes, we had a small conversation. He told me he was having problems with foreign exchange transactions, that if the banks, one bank in particular, Swiss Credit Bank, would give him a little more time he felt he could resolve it. I took it to be of minor consequence. He was still talking about doing business with us. I thought the amount of money would be of a minimal value that he would probably take the loss if he had to suffer a loss. And I thought nothing more about it.

Q Did you know that American IBC was insolvent on November 19, 1973?

A I had no idea at all on November 19, 1973, and if

I did I sure as hell would not have introduced Vanveerson or talked any new business and would have brought it to the attention of Wells Fargo in San Francisco.

Q Did you have any reason to believe that American IBC was insolvent?

A No.

MR. MILLER: I object.

THE COURT: Overruled.

Q What is the next time you talked with Mr. Silverston?

A The early part of December. I went on vacation the 11th-- probably around December 7th.

Q What caused that telephone call, Mr. Bolan?

A The cable that we received from Swiss Credit Bank stating that the payment of $1,000,000 was paid to us was an error, it had been pledged in and kindly return it, something to that effect. I do not have the cable in front of me.

Q I show you Defendant Exhibit N, a cable dated December 5, 1973, from Swiss Credit Bank to Wells Fargo Bank. Is that the cable you were referring to in your testimony?

A This is the cable that I referred to. It reads remitted to you through Chase Manhattan Bank New York on

November 16th --

MR. MILLER: If your Honor please, the document is in evidence. It is not necessary to read it.

THE COURT: I don't understand this whole procedure here. I think you are running over documents there that might give you personal satisfaction but it does not give me any enlightenment.

Q As a result of that cable did you call Mr. Silverston?

A I called Mr. Silverston and asked him what in the name of God was this all about. We had the cable. I gave in substance to him what the cable from the Swiss Credit Bank said and he retorted or informed me that, well, Swiss Credit Bank do not know what they are doing. It is not the moneys that were due you and that you have received. We have other deposits and somewhere they have gotten them mixed up, I will handle it.

Based on past experience of him handling other transactions that I thought were settled and evident on the Banco de la Republica transaction, that he could settle this one also.

Q Did you then go on vacation shortly thereafter?

A I went on vacation that following Monday.

Q When you returned from a vacation do you recall when you returned?

A I was on vacation on Monday the 11th through the 14th and I returned on the 17th of December.

Q What did you find when you returned on December 17th?

A A memoranda from Mr. Lilien that American IDC had assigned all things to creditors or were insolvent, that they were insolvent.

Q I show you Defendant Exhibit J, a memorandum dated December 11th and ask you whether that is the memorandum you saw when you returned?

A Yes, it is.

MR. STEWART: That is all.

REDIRECT EXAMINATION

BY MR. MILLER:

Q You are aware that Wells Fargo International has a test key with Wells Fargo Luxembourg?

A Yes.

Q Was there a substantial volume of traffic and telexes between the two organizations?

A I think the party that can answer that question on the substantial volume of traffic would be our cable department manager.

Q On this transaction alone, 47, 46, 43, 42, all in the period during the month of April and May, 1973.

A If you consider this a substantial volume of traffic between our two offices I will agree with you.

THE COURT: I would not.

Q Mr. Boland, looking at Exhibit H in pen it is written BC, Mr.Posniak, Lux.

A Right.

Q When was that written on the document?

A I have no idea or can recall the date. It would be prior to --

Q Did you write that on the document?

A No.

Q Do you know who wrote it on the document?

A Yes.

Q Who?

A Mr. Jean Jacque Fischou, operation officer.

Q When?

A I don't know.

Q Did you see him write it on there?

A No.

Q How do you know he wrote it on there?

A I know his handwriting.

Q You don't know when he wrote it on there, do you?

A That's right.

THE COURT: That's what he said to you a minute ago.

Q Are there any other documents that would show a blind copy written in pen that you have seen in the bank's files pertaining to this transaction?

A No copies that I have seen.

Q It is your testimony that this letter was sent as a blind copy, Exhibit H in response to an inquiry by telex and there was no telex replied to the question which was posed by Luxembourg?

A Yes.

Q In connection with the Dominican Republic transaction, you said the bank would finance it if the conditions were satisfied?

A That's correct.

Q Was that in your jurisdiction?

A I have never had any proposal offered to me that went through the proper channels turned down by the authorities that could say yes or no. So in my opinion the bank would finance it.

Q Did Mr. Silverston describe the whole transaction to you?

A Can we clarify which transaction?

Q Both Dominican Republic transactions.

A The new transaction he did not describe in full details with me. That is the reason I referred him to Mr. Vanveerson.

Q When you came back from vacation you found Exhibit T, correct?

A Yes.

Q That says refer all matters concerning the name, and I take it the name is American IBC Corporation, to C.E. Lilien.

A That's correct.

Q Is this usual bank practice?

A It most certainly is.

Q The chief executive officer of the Wells Fargo International Bank?

A It most certainly is.

Q Do you know it being done in any other situation?

A I can only speak for Wells Fargo Bank International.

Q Did Mr. Lilien have any conversations with you concerning the account of American IBC for which you were the account officer after you returned from your vacation?

A He told me that the account is insolvent and we do no further transactions with them.

Q Did Mr. Lilien ask you what kind of a relationship Wells Fargo Bank International had with American IBC?

A Mr. Lilien already knew what type of relationship--

THE COURT: He didn't ask you that.

Q Did you have a discussion as to what the relationship was?

A No, we did not.

Q So the only discussion was that you read this memorandum and that was the end of it, and all references were to be made to Mr. Lilien, is that correct?

A That's correct.

Q Did you know the terms of the settlement with the Banco de la Republica?

A I had no idea at all of the terms of the settlement.

Q Did you make any inquiry to find out the capability of American IBC of fulfilling that settlement?

A I did not.

Q You didn't ask Mr. Silverston?

A He told me they were having problems and they are reaching settlement. He never mentioned another word to me about what the settlement was, whether they arranged a settlement, whether the settlement had been finalized.

Q And you made no inquiries?

A No.

Q And you made no inquiry of the Banco de la Republica?

A That's correct.

Q As far as you know Wells Fargo Bank International made no inquiry?

A That's correct.

MR. MILLER: No further questions.

THE COURT: You are excused for all purposes. We will take a recess now until tomorrow morning.

(Witness excused)

THE COURT: 10 o'clock gentlemen.

(Adjourned to May 22, 1975, at 10 A.M.)

ALAN B. MILLER

74 Civ. 3714

v.

WELLS FARGO BANK INTERNATIONAL CORP.

May 22 ,1975
10 a.m.

- - -

MR. MILLER: If your Honor please, I have just a housekeeping detail. Mr. Stewart furnished us with copies of defendant's exhibits this morning and going through them quickly we have noted that certain of the exhibits, and we haven't made a complete review of them, do contain either pen or penciled underscoring which I am informed by Mr. Stewart he did to highlight for his own use what he considered to be significant.

I would like to have an understanding that we will replace the original exhibits, the exhibits furnished to the Court without the underscoring.

THE COURT: That's all right. I will look to see what he emphasizes to see whether I agree.

MR. MILLER: Yes, sir.

Mr. Romano.

VICTOR ROMANO, called as a witness, on behalf of the plaintiff, being first duly sworn, testified as follows:

BEST COPY AVAILABLE

DIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Romano, in April and May of 1973 what was your occupation?

A I was executive vice president of American IBC.

Q You are executive vice president of American IBC Corp.?

A Yes.

Q Mr. Romano, I show you Exhibit 1, April 30, 1973, and Exhibit 2, May 2, 1973, those are plaintiff's exhibits.

Did you negotiate the terms of those agreements with Wells Fargo Bank International?

A No, I negotiated the rates with them. I would not even say negotiated. I just asked them what the rates would be because in order to work such a transaction we have to be satisfied that what we pay on the dollars we borrow and what we receive on the Swiss francs we invest, also the date of the conversion of the Swiss francs and future time finally leave us with a certain profit.

Q Did you have any conversations with Mr. Boland?

A Yes, just on the rates.

Q The rates for what?

A At what rate we would borrow from them U.S. dollars to buy Swiss francs in Europe.

Q That was all the conversation you had with Mr. Boland?

A Yes.

Q You just asked him the rates and he told you what the rates would be?

A Yes.

Q By the way, Mr. Romano, have you ever had lunch with Mr. Boland?

A No, never.

Q Did you ever personally meet -- withdrawn.

When did you become a resident of the United States?

A In 1957, December, '57.

Q Did you ever meet Mr. Boland prior to December 1957?

A No, I came to the United States in June '57, before I used to come here just on visits. At the time I was general manager in Argentina and Brazil of one of the most important grain houses with headquarters in Paris.

Q Subsequent to December 1957 and until yesterday, Mr. Romano, did you ever meet Mr. Boland?

A I met him yesterday for the first time.

Q You never personally met him before that?

A I don't think I ever met him. Yesterday he told me that --

THE COURT: Never mind that.

Q Mr. Romano, I show you Exhibit 24, a letter dated January 24, 1973.

A Yes.

Q Is that your letter?

A Yes.

Q That is your signature on the letter?

A Yes, I sent it to several of the banks.

Q You sent that particular exhibit to Mr. Boland, is that correct?

A Yes, "Attention Mr. Boland."

Q Why did you send that to Mr. Boland?

A Because he was the man in charge of American IBC at Wells Fargo.

Q Was there any reason why you sent that letter?

A Yes, I wanted to disassociate myself from American IBC.

Q Why?

A Because I had resigned. I had a quarrel with Mr. Silverston and I preferred not to appear as still being with him.

Q For what reason, sir?

A Well, first of all -- what would I say?

Q Take your time.

A Okay.

Well, since some time before he was not working on a proper basis, he was not working properly. He did things which were not to be done in the normal practice.

THE COURT: Am I concerned in any way with why he quit?

MR. MILLER: Withdraw the question.

THE COURT: STrike out the answer, too. I think it is irrelevant to this thing. It seems to me it is objectionable but there comes a time when an objection is not made the Court has to make an objection to keep the case within rational limits. I think you referred to that exhibit as January.

MR. MILLER: No, your Honor. July. July 24th, your Honor.

THE COURT: You sent this to a man that you never met? You never met Romano before you --

MR. MILLER: Boland.

THE WITNESS: I never met him until yesterday.

THE COURT: But you wrote him a letter?

THE WITNESS: Yes.

THE COURT: You knew he was the account officer?

THE WITNESS: I spoke to him from time to time.

Q On the telephone?

A Yes, on the telephone.

Q Were you aware of the financial condition of American IBC on July 24, 1973?

A I thought I should be aware. I did not know --

Q Were you?

A I was not because I never had any balance sheet in hands, any financial statements. This was one of the reasons why I decided to quit.

Q Mr. Romano, did you introduce Mr. Silverston to Wells Fargo Bank International?

MR. STEWART: Objected to as leading.

THE COURT: It is not a leading question.

A I introduced him to Mr. Jardin, of Wells Fargo.

Q Who is Mr. Jardin?

A He is a friend of mine since 1965. He was in New York at the time. I had lunch with him. I took an opportunity to take him to Mr. Silverston and introduce him.

Q Did you maintain any kind of relationship with Mr. Jardin thereafter?

A Occasionally when he came to New York we had a drink When I went to San Francisco I had a drink with him, that's all.

Q Subsequent to the time that you resigned as an officer of American IBC Corp., executive vice president was that?

A Yes.

Q Did you subsequently see Mr. Jardin?

A I saw him in August '73.

Q August '73?

A Yes.

Q Where?

A San Francisco.

Q Did you say anything to him about American IBC Corp.?

A No.

Q Did he say anything to you?

A No. In fact, when I saw him --

THE COURT: Please don't volunteer. Let the lawyers conduct the trial. Don't help them.

Q Was he aware that you resigned?

A Yes, he was aware.

Q How do you know that?

A Because I came to ask for business on my own name.

Q Did he ask you why you were asking for business in your own name?

A Because I had quit.

MR. STEWART: Objection.

THE COURT: I don't think that is relevant, Mr. Miller. I am still having trouble finding that exhibit. I don't know why it is not among those that I had in chronological sequence here.

MR. MILLER: It was referred to yesterday.

THE COURT: I thought I had the exhibits all in chronological order, but apparently I don't.

MR. MILLER: During Mr. Boland's testimony it was referred to.

THE COURT: Let me find it because it is easier for me to keep the papers in proper order.

Go ahead.

MR. MILLER: I have no further questions.

THE COURT: Any cross examination of this witness?

CROSS EXAMINATION

BY MR. STEWART:

Q Mr. Romano, is Mr. Silverston a liar?

A Yes.

MR. STEWART: No further questions.

THE COURT: Thank you, step down.

(Witness excused.)

MR. MILLER: Mr. Coutsantonis.

GEORGE COUTSANTONIS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q Mr. Coutsantonis, what is your occupation?

A I am a credit officer right now.

Q Where?

A Wells Fargo Bank International.

Q How long have you been a credit officer?

A Since October 1974.

Q Prior to that time?

A I was a credit analyst.

Q How long were you a credit analyst?

A For two years.

Q So that during 1973 you were a credit analyst?

A That is right.

Q What are the duties of a credit analyst?

A The duties is to spread the figures from financial statements presented to us for potential loans, also conducting checkings with bonds, ordering D&B's and preparing the CR-39 form which is a packet containing all the loan preparation.

Q Does a credit analyst make any evaluations?

A Not actually.

Q What do you mean not actually?

A The credit analysis at that time was made by the loan officer.

Q What was the relationship of the credit analysis to the loan officer?

A The loan officer was bringing in to the statements of a customer to the credit analyst for spreading and given back to him for final decision or evaluation.

Q Would the credit analyst make any comments to the loan officer?

A I would say yes. Sometimes yes, sometimes no.

Q Were there conversations between the credit analyst and the loan officer concerning a ticket?

A When I was there I didn't have actually that many conversations.

Q But you had some, didn't you?

A Very few, if I remember.

Q But you did have some?

A Yes.

Q Mr. Coutsantonis, I show you Exhibit 26 dated October 31, 1973, that is the CR-39.

A Yes.

Q And you prepared that CR-39,did you not?

A That is correct.

Q What is a CR-38?

A CR-38 is a form preceding this that is the first approval actually of the loan, a preliminary report to this.

Q Why was CR-39 prepared?

A That is the procedure.

Q What is the procedure?

A That a CR-39 has to follow containing all the information.

Q Has to follow what, sir?

A Excuse me?

Q What does it have to follow?

A It follows the CR-38.

Q Do you have a CR-38 pertaining to that CR-39?

A There is a CR-38 pertaining to this.

Q Do you have it?

A There is in the file.

Q Have you seen it?

A Sure I've seen it.

MR. MILLER: Do you have a CR-38, Mr. Stewart?

MR. STEWART: No. Although, wait a minute, maybe we do.

MR. MILLER: I would note that it has never been produced before.

THE COURT: Please, this is not that kind of discussion. Please don't clutter up the record with that kind of talk.

MR. STEWART: All of these have been produced several times.

THE COURT: I am not interested in that. This is not a time for taking up pretrial preparation.

MR. MILLER: Has this been marked in evidence?

MR. STEWART: No.

Q I show you the document which Mr. Stewart just hande me dated October 19, 1973. Is that the CR-38?

A Yes, it is.

MR. MILLER: I apologize, your Honor, but I would like to have this marked in evidence.

(Plaintiff's Exhibit 54 received in evidence.)

THE COURT: Is there an extra copy of this?

MR. STEWART: That's the original.

THE COURT: Have you got a copy for me?

MR. STEWART: We will make one. We never introduced it.

THE COURT: Mr. Stewart, all I want is a copy. I don't care about all the rest of the talk.

MR. STEWART: We will get one, your Honor.

Q Mr. Coutsantonis, do you recall when you received the CR-38?

A Around October 19th, maybe two days later, around that date.

Q And the CR-38 is an authorization for you to prepare a CR-39?

A Yes, the CR-38 is.

Q That CR-39 is prepared in connection with the two loans which are described on CR-38?

A Yes.

Q For the approval of those two loans, is that correct?

A Yes.

Q Two loans which had been made in May of 1973?

A I'm not sure about it.

Q Look at both exhibits, please, Mr. Coutsantonis.

A Yes.

Q When were those loans actually made by the bank?

A I don't know. It doesn't show here when the loans were made. This is dated October 19th. I assume around -- I don't know. I cannot answer it.

Q Was it your understanding when you received those documents that the bank was seeking to consider approval of those two loans?

A Yes.

THE COURT: His understanding is of no relevance to this transaction.

Q Is that the purpose of preparing a CR-39?

A What is the purpose?

Q To consider the approval of loans?

A Yes.

Q Is that Mr. Hawkins' signature, do you know, on CR-38?

A Yes, it is.

Q That is Mr. Helene's also?

A That is Mr. Boland's signature for Mr. Helene.

Q Did you know that Mr. Boland was the loan officer for the account of American IBC?

A Yes, I did know.

Q I am not sure I can make this out. Does this CR-38 say that a tangible net worth of the American IBC Corp. is $84,000?

A Yes.

Q Do you know the source of that information?

A From the financial statements.

Q Which financial statements?

A The 5/31/72.

Q What did you do after you got the CR-38, Exhibit 54?

A I started preparing the CR-39.

Q Tell us what you did, step by step.

A I transferred this information, the two transactions to CR-39 and prior to that I had spread the figures.

Q When you say --

A From the financial statements to our own form.

Q When you say spread the figures, you transposed figures?

A Yes.

Q You took figures from where?

A From the financial statements of American IBC and I put them in the order the complied with out form.

Q The May 31, 1972 figures?

A Yes.

Q At that time did you know that the fiscal year end of American IBC was May of each year?

A Sure, I knew.

Q And you knew that fiscal year had ended in May 1973?

A Yes.

Q And you were using figures from May 1972, is that correct?

A That's what I had available. Whatever I have available.

Q Did you make any requests for additional figures?

A No.

Q Did you speak to Mr. Boland?

A The loan officer is really supposed to get the figures.

Q Did you speak with Mr. Boland about that?

A I don't remember.

Q Are you in the same office as Mr. Boland?

A No, I am not.

Q Different floor?

A Different floor.

Q Do you see Mr. Boland regularly or did you see Mr. Boland in those days regularly?

A Yes.

Q Did you speak with Mr. Hawkins about the old figures from May 1972?

A No.

Q Did you speak to Mr. Helene?

A No.

Q What did you do next?

A I had conducted checkings with other bonds that American IBC had accounts with or they had extended facilities to them.

Q How do you conduct a checking?

A I get the names of the banks from the loan officer that American IBC had an account with and I call them up for whatever information they have.

Q In other words, you go to Mr. Boland in this case and you ask him the names of the banks?

A Yes.

Q And the loan officers of the banks?

A Not the loan officer.

Q Just the names of the banks?

A Just the names of the banks and I call the credit departments.

Q After you received the CR-38 and you prepare the first page of the CR-39, you spoke with Mr. Boland about what banks American IBC Corp. did business with?

A I had -- the banks were already in the file from last year.

Q Did you speak to Mr. Boland?

A I don't remember if I spoke to Mr. Boland but I did have the information in the file so I didn't bother him about this bank. I picked them up from the file, what banks I had last year and I conducted checkings with the banks.

Q You didn't ask him whether American IBC had any new banks?

A No, I didn't.

Q After you got the names of the banks, what did you do? How do you do a checking?

A I call the credit department of those banks and I tell them that I want to do checkings for American IBC. After one or two days they call me back and give me whatever information.

Q What precisely, Mr. Coutsantonis, do you say?

A What do I say?

Q Yes, on a checking.

A Well, I release as little information as possible.

Q You say to the other bank you release to him as lit information as possible?

A Generally speaking I don't release too much information.

Q Listen to me, please. Let's say you call National Bank of North America about American IBC Corp. Tell the Court what you said to whoever you spoke to at the National Bank of North America.

A I want to --

MR. STEWART: I object to this as hearsay, your Honor.

MR. MILLER: That's what he did.

THE COURT: You're not asking him what he did, you're asking him for his practice. He is not telling you that.

Do you now recall what you did on this occasion? Or are you telling us what you generally do?

THE WITNESS: What I generally do.

THE COURT: You are not referring to what you did in this specific instance, are you?

THE WITNESS: I cannot remember. I dealt with so many banks.

THE COURT: I understand you. I am not stopping you from telling your general practice, but I want to understand that you're talking in generalities and you are not talking in specifics. Go ahead and tell us what you generally do, what your regular course of business is.

THE WITNESS: The general course of business is I will call the banks and I will tell them I want to conduct a mutual account if the other bank had extended facilities for them or had an account for American IBC. This is called a mutual account division, we mutually exchange information.

Q In relation to this particular account, Mr. Coutsantonis, did you conduct checkings?

A Yes.

Q Who did you check with?

A Broad National Bank, New Jersey, Republic National Bank, National Bank of North America.

Q Do you recall calling Bank of North America?

A And Chemical Bank of New York.

Q Do you recall calling National Bank of NOrth America?

A I have put my initial here. That means that I called them.

Q Do you have any recollection?

A I don't recall.

Q After you spoke to the credit department of another bank you record what they say to you?

A Yes, I put down whatever information they give me.

Q Where?

A In a scratch paper.

Q What do you do then?

A I give it to a typist and she puts it on this form.

Q The CR-39 contains all the information that you obtained from the other bank?

A Yes.

Q According to CR-39, the page you just referred to, it indicates Mr. Williams from National Bank of North America stated we do not have a facility at the moment for the subject. In the past we have extended facilities on a secured basis. We cannot make any comment about our experience with the subject.

Did you ask him what he meant by that?

A No, I didn't.

Q Did you tell Mr. Boland you received a "no comment" from National Bank of North America?

A No, I didn't tell him in person. I just presented to him the package, the CR-39 package.

Q Is it fair to say, Mr. Coutsantonis --

THE COURT: I will not accept this business about what is fair, I want to know what is accurate.

Q When Mr. Williams gave you this information, what did you do?

A I gave it to my typist and she typed it and I put it with a whole package of the CR-39 and presented it to the loan officer.

Q You took it to the loan officer?

A Yes.

Q You asked no further questions after Mr. Williams gave you that information?

A No I did not.

MR. STEWART: Objection. He already answered that.

THE COURT: He may answer it again. He answered it.

THE WITNESS: No, I did not.

Q And you took this to Mr. Boland and presented it to him, as you say?

A Yes.

Q Did you discuss it with Mr. Boland?

A No, I didn't.

Q Mr. Coutsantonis, on page 2 of Exhibit 26, the CR-39 there is a section marked or titled Questionnaire. Question number 7 is "Does borrower's business record show any bankruptcy or arrangements with creditors; are there any suits pending or tax liens existing."

Did you answer that question in preparation?

A Yes.

Q How did you answer it?

A I answered "No."

Q How do you know that?

A From whatever information I had in the file. I went through the file and I didn't see anything.

Q Whatever information you had in the bank's files?

A In our file, the bank's file about American IBC.

Q Did you call American IBC Corp.?

A No.

Q Does the bank have a litigation report?

A I don't know.

Q Do you know what a litigation report is?

A I guess it must be --

THE COURT: You're not supposed to guess. He is asking you do you know. You either know or you don't know.

THE WITNESS: It must be a pending lawsuit.

Q Have you ever seen a litigation report?

A No, I haven't. So I don't know.

Q Mr. Coutsantonis, I note in the questionnaire portion of CR-39 some of the questions have areas with parentheses in the columns for yes or no. Do the parentheses have any significance?

A You have to give an explanation whatever mark you put in the parentheses.

Q If an answer is checked off in a parentheses there must be an explanation?

A Yes.

Q Question 3 "Has there been any major change in management personnel?" There is an "X" under the column yes in parentheses which required an explanation, is that correct?

A Yes.

Q What was the explanation?

A Victor Romano, Executive Vice President, Gonsalo Ospina, Vice President, and Luis Lara, Vice President, are no longer associated with the corporation.

Q Was that significant?

A Significant in what sense?

Q In the approval of these two loans.

MR. STEWART: I object to that.

THE COURT: Did you have any function about approving loans?

THE WITNESS: No, I didn't.

Q Did you discuss that with Mr. Boland?

A No, I didn't.

Q When the CR-39 is completed, Mr. Coutsantonis, what happens to it?

A It goes to the loan officer.

Q Axd you presented it to the loan officer?

A Yes. Either I present it or I give it to my typist and she takes it to him.

Q And he is the only one that gets a copy of it.

A He gets the original.

MR. STEWART: He already testified to that, your Honor.

THE COURT: Mr. Miller is testifying for him at this point. He has called this witness and he is telling him what the facts are in this connection.

MR. MILLER: I would submit that Mr. Coutsantonis is a hostile witness.

MR. STEWART: He is not hostile.

THE COURT: I don't see how he is hostile on that subject that you just asked about.

Q Is there a circulation of the CR-39?

A When the CR-39 is prepared the original goes to the loan officer.

Q Yes.

A He goes through. He signs it and takes it to the executive vice president for final approval and after that he brings it back. It comes back to me. I make copies and one copy goes to circulation.

Q To whom?

A To all the officers.

Q The officers of?

A Wells Fargo Bank International.

Q Does anything go to San Francisco?

A The original goes to San Francisco.

Q You don't keep the original?

A No, I don't keep the original.

Q To whom does it go in San Francisco?

A I sent it to Art Hellsten.

Q Continue.

A He is my counterpart in Wells Fargo Bank in N.A.

Q Did Mr. Lobonov get a copy of this? That's the CR-39?

A Except for the circulating copy. He doesn't get a copy specifically.

Q But he is on the circulation list, as far as you know?

A Yes.

Q So he would get the copy that goes on the circulation list?

MR. STEWART: I object to this. He is testifying for the witness.

MR. MILLER: If I am wrong, the witness will say "No."

THE COURT: Not very much is advanced by that kind of proof, Mr. Miller. You will have to get the answers from the witness, not yourself. You can't do it that way.

Q Do you know who is on the circulation list?

A Yes, I know.

Q Who?

A At that time it was Mr. Helene.

Q Executive vice president?

A Yes. Mr. Boland, vice president. Mr. Lobonov, vice president. Mr. Hawkins, vice president. Mr. Vanveerson, vice president. Alfred Best, assistant vice president. And Ferreiro, assistant vice president.

MR. MILLER: I have no further questions of this witness, your Honor.

THE COURT: Could I see that CR-39 again, please?

CROSS EXAMINATION

BY MR. STEWART:

Q You receive Dun & Bradstreet reports, do you not?

A Yes.

Q And a Dun & Bradstreet report reports litigation, isn't that correct?

MR. MILLER: If your Honor please --

THE COURT: If it is correct, then the Dun & Bradstreet speaks for itself.

Q You earlier had responses in your checkings from other banks with respect to American IBC where they did not comment, isn't that right?

A I didn't conduct this checking. Somebody else did, but we did have checkings, yes, prior.

Q I show you Defendant's Exhibit --

MR. MILLER: I move to strike that portion of the answer that was unresponsive.

THE COURT: I will leave it.

Q I show you Defendant's Exhibit AJ, the third line from the bottom. Would you read it please.

A Last statement spread is 11/30/70, no comments.

Q What is the date of that checking?

A 5/17/72.

Q I show you Defendant's Exhibit AH dated October 1, 1971, and ask you to read the second line from the bottom.

MR. MILLER: The document is in evidence.

THE COURT: I think both sides are trying to inform me as to what is there and if my ears are just as good as my eyes, I will listen to what he says.

A May 20, 1969 financial statement spread without comment.

MR. STEWART: No further questions, your Honor.

REDIRECT EXAMINATION

BY MR. MILLER:

Q On the last exhibit, I think it was AH, that you just read, you just read one sentence, is that correct?

A Yes.

MR. MILLER: I have no further questions of the witness.

THE COURT: Apparently the document handed to me as Exhibit 26 was a single page, apparently the cover sheet of the October 31st CR-39. Am I to understand that the whole of the report as well as this cover sheet is part of it?

MR. MILLER: Yes, sir.

THE COURT: Then I give you back the one that your office handed to me and I will keep this full copy as the copy for myself.

MR. MILLER: Yes, sir.

MR. STEWART: In connection with Mr. --

THE COURT: Thank you.

(Witness excused.)

MR. STEWART: Mr. Jardin was brought from San Francisco and deposed by the plaintiff and in effect confirmed Mr. Romano's testimony that they did not discuss American IBC.

THE COURT: Why are you telling me this? Are you testifying?

MR. STEWART: No, sir.

THE COURT: What do you want?

MR. STEWART: If they will stipulate that if Mr. Jardin were called --

THE COURT: That is something you discuss with them. This is in the middle of Mr. Miller's case. Why do you interrupt it with that?

MR. STEWART: I will withdraw it, your Honor.

ALAN B. MILLER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MILLER:

Q What is your relationship to American IBC Corporation?

A I am the trustee in bankruptcy of American IBC.

Q How long have you been a trustee in bankruptcy?

A Since the commencement of the case in early '74, as I recall it.

Q Could you tell the Court what the assets of the bankrupt estate are?

A Yes. At the present time there is the sum of $51,536 cash in bank or in certificates of deposit. In addition to that there is an account receivable due from a firm known as Design India in the amount of $7,200. We have been attempting to affect collection but have been unable to up to this point. There are some promissory notes issued by an affiliated entity in Versionis, IBC Ltd., none of which have been paid but many of which have been in default since prior to the commencement of the case.

THE COURT: What is the face amount of those notes?

THE WITNESS: There are seven notes, your Honor, four in the amount of $250,000 which were due in October, 1973 and three notes of $50,000, which were due in 1974, roughly mid-'74, and then at the end of '74 and then '75. The total of the seven notes is 1,150,000, a million of which were overdue in October 1973.

There is also a federal income tax refund claim pending in the net amount of $53,970.31. I say net, because the Internal Revenue Service has filed a claim in the bankruptcy court for approximately $19,058, and if you deduct that claim from the total amount of the refund claim, the net is $53,970. To my knowledge those are the only assets of this estate.

Q Has an effort been made to collect the notes?

A Yes, demand has been made and those notes are not collectable to my knowledge.

Q Have you examined the claims filed against the bankrupt estate?

A I have. I should say I have examined some of them. I haven't examined each and every one of them.

Q Do you know the total of the claims filed?

A I believe it is approximately $9,000,000.

Q Are these claims unsecured?

A They are with the exception of one claim where there was an attachment received for $70,000. That was about a $3,000,000 claim.

MR. MILLER: I have no further questions.

THE COURT: Is Silverston a claimant?

THE WITNESS: I do not believe so, your Honor.

May I refer to the claims docket just to check?

THE COURT: Yes.

THE WITNESS: He is not, your Honor.

THE COURT: Is American IBC a claimant?

THE WITNESS: That is the bankrupt, Judge.

THE COURT: Yes, that's true.

Is there anybody who is connected directly or indirectly with American IBC who has asserted a claim other than for work, labor or services?

THE WITNESS: There are no claims that I know of by affiliated corporations. There are a couple of small claims by individuals which don't total $2,500.

THE COURT: Are there any claims from Swiss Bank?

THE WITNESS: Yes, the Swiss Credit Bank has filed a claim of $990,483, your Honor.

THE COURT: Have you got the claim file on that claim?

THE WITNESS: I have a photostatic copy of the claim, your Honor.

THE COURT: What is the consideration of that claim?

THE WITNESS: May I read from the claim, your Honor?

THE COURT: Yes.

THE WITNESS: The consideration for this debt is as follows:

"Commencing in January 1973 and continuing through December 1973, Swiss Credit Bank extended credit to the bankrupt by entering into time deposit financial transactions for the account of the bankrupt and by covering withdrawals and overdrafts in the bankrupt's various bank accounts. Notwithstanding demand for payment of such advances, the bankrupt refused to make such payment and remains indebted to Swiss Credit Bank in the sum of $990,483.07 plus interest through and including January 29, 1974 as reflected by Exhibit A hereto."

There is attached to the document the claim, a statement of a current account with Swiss Credit Bank and American IBC Corp. showing a total balance due in favor of Swiss Credit of $990,483.

THE COURT: Is there a detail as to how that is built up?

THE WITNESS: There is not, your Honor.

THE COURT: Have you any information as to what these time deposits were between January '73 and the end of '73?

THE WITNESS: The information on the statement appears to indicate that this indebtedness was as a result of foreign exchange transactions.

THE COURT: I am talking about the breakdown. I want to know what relationship if any they have with the two transactions that are in suit here.

THE WITNESS: I cannot answer that, your Honor.

THE COURT: Have you made any inquiry as to whether or not the two transactions that are involved here are included in any way, shape or form in that $990,000?

THE WITNESS: What I have done, your Honor --

THE COURT: Just tell me the answer.

THE WITNESS: Yes, I have asked my accountants to review the books and records and the transactions to determine the precise nature of these transactions.

THE COURT: Whose books and records?

THE WITNESS: The bankrupt's.

THE COURT: How about the Swiss Bank's records? Have you got any indication from the Swiss Bank as to whether or not they have in any way, shape or form included the two $1,000,000 loans that are involved in this case?

THE WITNESS: I have not personally, no, your Honor.

THE COURT: As far as you are aware this $990,000 was built up on time deposits exclusive of the two involved in this case, is that right?

THE WITNESS: As far as I know, that is correct.

THE COURT: Have you made any inquiry to ascertain why that exclusion has occurred?

THE WITNESS: I'm sorry, I don't understand, your Honor.

THE COURT: You have just told me that the $990,000 was exclusive of the two transactions for the two $1,000,000 involved in this case. Have you made any inquiry, either directly or through your counsel or your accountants of the Swiss Bank as to why they have not included the time deposits involved in this case in the running account which gives rise to the claim that they have asserted in bankruptcy against the bankrupt estate?

THE WITNESS: Apparently the claim they have asserted --

THE COURT: Just answer my question. I will decide what is apparent. I have asked you have you made any inquiry and received any report from any of those sources?

THE WITNESS: No, I have left it to my accountants and my counsel, your Honor.

THE COURT: And you have no report in your file?

THE WITNESS: I have no independent knowledge.

THE COURT: All right.

CROSS EXAMINATION

BY MR. STEWART:

Q You are a partner of WEil, Gotshal & Manges?

A I am.

Q And you are counsel for Swiss Credit Bank?

A My firm was.

Q And still are, are you not?

A As far as I know, yes.

MR. STEWART: No further questions.

REDIRECT EXAMINATION

BY MR. MILLER:

Q When Mr. Stewart asked you whether you were counsel, you are not general counsel?

A I don't believe so. I never personally engaged in any of the matters that related to Swiss Credit Bank in respect of this estate or any other transaction. That was handled by other members and associates of my firm.

THE COURT: Your firm prepared and filed the claim for Swiss Credit Bank against this estate?

THE WITNESS: That is correct.

THE COURT: And you are a partner of that firm?

THE WITNESS: That is correct.

THE COURT: You are in the position as the trustee of receiving a claim of a client of your firm against an estate that you are handling?

THE WITNESS: That is correct, your Honor.

MR. MILLER: But the Bankruptcy Act specifically permits--

THE COURT: I am not concerned with the Bankruptcy Act and this has no reflection on Mr. Miller. The thing which puzzles me is in view of the representation by Mr. Miller through his partnership in the firm with the Swiss Credit Bank, I would think that there ought to be an in depth inqu[illegible] into why the two $1,000,000 transactions are not included in the running account involving the $990,000. I think that might have some bearing on the case.

MR. MILLER: I have no further questions.

THE COURT: Anything else?

MR. STEWART: No, sir.

THE COURT: Thank you.

(Witness excused.)

MR. MILLER: I call Mr. Wiener, your Honor.

MR. STEWART: I don't see any relevance to Mr. Wiener's testimony.

THE COURT: Neither do I, because I haven't heard it yet and when I hear it I will rule on your objection.

MR. STEWART: I object to his being called.

THE COURT: Objection overruled.

I can't take an objection to a witness being called.

ROBERT WEINER, called as a witness, being first duly sworn, testified as follows:

MR. STEWART: I don't think it proper for an attorney to testify in his own behalf.

THE COURT: Yes, under certain circumstances that is correct and Mr. Miller will bear that in mind. There is no reason why Mr. Miller can't call the President of the United States if he wants to, if it's relevant and until the questions are asked I can't rule him out. He can call you if he wants to. It might be an impertinent call but that remains to be seen.

DIRECT EXAMINATION

BY MR. MILLER:

Q Are you familiar with the claim of the Swiss Credit Bank filing in the bankruptcy proceeding?

A Yes, I am.

Q Do you know why that claim excludes the two time deposit transactions which are the subject of this case?

THE COURT: I am not going to permit him to answer that question because he is not an officer or director or an employee of that corporation and any knowledge that he may have obtained he obtained in other capacities.

Q Did you make an investigation of that claim?

A Yes, I did.

Q What was the result of your investigation?

MR. STEWART: Objection.

THE COURT: I will not permit that inquiry either.

MR. MILLER: Your Honor inquired of the trustee in bankruptcy as to why that was excluded.

THE COURT: The trustee in bankruptcy is the owner of the assets and also the one who has to pass upon the claims and I would take it as his duty to ascertain the validity and the scope and the meaning of the claims.

This man is not in that category.

MR. MILLER: He is the attorney, part of the team of attorneys working for the trustee who has been delegated by the trustee to make the investigation.

THE COURT: That is different. You didn't bring that out first. I think you ought to ask those preliminary questions.

I had no such indication.

Q What is your occupation?

A I am an attorney-at-law.

Q With whom are you associated?

A Weil, Gotshal & Manges.

Q Have you rendered services for the trustee in bankruptcy in this case?

A Yes.

Q What services?

A I have investigated the claims, I have conducted Section 21(a) examinations and prepared legal memorandum.

Q Have you made an investigation in connection with the claim of Swiss Credit Bank ?

A Yes, I have.

Q Did you do that at the request of the trustee?

A Yes, I did.

Q What were the results of that investigation?

THE COURT: What did you do first?

THE WITNESS: I subpoenaed all the documents from the various banks which have filed claims one of which was Swiss Credit Bank.

THE COURT: Please, don't confuse me. I am asking what you did in connection with inquiring into the Swiss Credit Bank claim, not your general services.

THE WITNESS: I asked Swiss Credit Bank for documents reflecting how their claim of $990,000 arose. They supplied me with all the background documentation.

I reviewed all of that documentation and I learned that the claim arose over a period of time in 1973. Apparently the bankrupt had a number of accounts with Swiss Credit Bank, one of which was a U.S. dollar account.

From time to time the bankrupt would require or request that Swiss Credit Bank make advancements and charge it to that account. This built up an estate or a debt of approximately $685,000.

What would happen is they would transfer funds to an entity at the bankrupt's request, whether it is another bank or an individual or whatever.

In addition, through the U.S. account at Swiss Credit Bank the bankrupt entered into some foreign exchange transactions separate and apart from the transactions which are currently before the Court in this action.

As a result of those transactions the bankrupt suffered substantial losses, approximately I think around $300,000. Taking the total of those losses and the advances made by the bank during the year they filed their claim.

I believe --

THE COURT: Does that add up to the total of $990,000?

THE WITNESS: Yes.

THE COURT: There are two categories, dollar loan transactions and there are foreign exchange transactions apart from the two $1 million loans that are the subject of this lawsuit?

THE WITNESS: That is correct.

THE COURT: Those two categories together total the $990,000?

THE WITNESS: That is correct.

If I may say, I believe the defendants have introduced into evidence the account statements of the year for the U.S. dollar account and the swiss franc account.

The U.S. dollar account should contain --

THE COURT: Let Mr. Miller conduct the examination. I am sure if there is something he wants to bring out he will. You have now explained to me what the breakdown is of the $990,000 and it is very clear that it has nothing at all to do with the two $1 million loans made in May of 1973.

MR. MILLER: I have no further questions.

MR. STEWART: No questions.

THE COURT: Thank you, Mr. Weiner.

(Witness excused)

MR. MILLER: If your Honor please, I would offer into evidence extracts from the deposition of Mr. Charles E. Lilien, executive vice-president of the bank. I can cite into the record those portions just citing the references and the pages unless your Honor wants me to read them.

MR. STEWARD: If your Honor please, I have Mr. Lilien here and I am going to call him.

THE COURT: That doesn't mean anything. He can conduct his case the way he wants to.

MR. MILLER: The deposition was taken on November 6, 1974 and it was signed by Mr. Lilien on January 15, 1975.

THE COURT: Call my attention to the offers and as you make each offer we will see whether it is relevant.

MR. MILLER: I would offer page 3 lines 7 through 25 which describe Mr. Lilien and his relationship to the bank. Page 4 lines 2 through 12, your Honor. Page 6 lines 23 through 26. Page 7 lines 2 through line 8. Page 8 lines 2 through line 25. Page 9, lines 2 and 3. Page 12, lines 22 through 25. Page 13, lines 2 through 25. Page 14, lines 2 and 3. Page 26, lines 6 through 22. Page 27, lines 23 through 26. Page 28, lines 2 through 25.

Page 41, line 22 to line 25. Page 42, line 2 to line 12. 43, line 16 through line 25. Page 44, lines 2 and 3, 13 through 16, 17 through 25.

Page 45 lines 2 through 12, line 17 through 25. Page 46, lines 2 through 11. Page 47 lines 9 through 21. Page 48, line 8 through 25. Page 49, line 11 through line 22.

THE COURT: Is there any counter-reading that you want to do, Mr. Stewart?

MR. STEWART: I object to the introduction of the deposition testimony.

THE COURT: On what ground?

MR. STEWART: On the ground that we have the witness right here live.

THE COURT: The rule provides that the deposition of a party may be read by his adversary regardless of his presence. If a party wanted to read his own witness' testimony and the witness were here and alive, that would be a sound objection.

But if you want to read the opposite party's testimony that comes in under the head of permissible admissions.

MR. STEWART: Yes, sir.

THE COURT: You are privileged, in view of the fact that the record now contains testimony from this deposition that has been read, to read any explanatory parts, if you desire, or just to rest on your laurels and do nothing and present the witness.

THE COURT: I think I will rest on my laurels, your Honor.

THE COURT: Is there anything else you want to read?

MR. MILLER: No, your Honor.

The plaintiff rests, your Honor.

MR. STEWART: I would like to introduce the entire deposition rather than just lines.

MR. MILLER: I object to that.

THE COURT: What is the objection?

MR. MILLER: The objection, your Honor, is that there is a substantial amount of colloquy, number one, in the deposition.

THE COURT: He is not offering the colloquy. He is offering the testimony.

MR. MILLER: If he wants the entire deposition to go in I will not object.

THE COURT: The entire deposition is then received by consent. I will pay no attention to the lawyers talk unless it shapes a particular question or answer.

The plaintiff has rested, Mr. Stewart.

MR. STEWART: At this time the defendant moves to dismiss the complaint on the grounds that the plaintiff has not proven a case on the facts or the law.

THE COURT: I will reserve decision on that motion.

(Defendant Exhibit AL received in evidence)

MR. STEWART: If your Honor please, Mr. Jardin was deposed by the plaintiff here in New York. He is in San Francisco and I would ask Mr. Miller whether he will stipulate to the admission of his deposition testimony as evidence.

MR. MILLER: No, sir.

MR. STEWART: You will not so stipulate?

MR. MILLER: No, sir.

THE COURT: Is he here?

MR. STEWART: No, sir, he is in San Francisco.

THE COURT: Do you stipulate that Mr. Jardin is in San Francisco, Mr. Miller?

MR. MILLER: I have no knowledge whatsoever, your Honor.

THE COURT: Put on proof then that Mr. Jardin is in San Francisco and unavailable by reason of geography.

An unavailable witness' testimony can be read.

CHARLES E. LILIEN, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STEWART:

Q What is your occupation, Mr. Lilien?

A I am an executive vice-president of Wells Fargo Bank International and I am also a vice-president of Wells Fargo Bank NA.

Q How long have you held that position, sir?

A I became an executive vice-president of Wells Fargo Bank International in approximately July of 1969 and I became a vice-president of Wells Fargo Bank NA in June of 1974.

Q Do you know Mr. Jardin with that bank?

A Yes, I do.

Q What is his occupation, sir?

A Mr. Jardin is a vice-president of Wells Fargo Bank NA.

Q Where are they located?

A Mr. Jardin works in the head office of that bank which is located in San Francisco, California.

MR. STEWART: At this point I would like to renew my motion to introduce the deposition testimony.

THE COURT: Where is he today?

THE WITNESS: Sir, to the best of my knowledge today he is in Teheran, Iran, on a business trip.

MR. MILLER: May I ask a question?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. MILLER:

Q Mr. Lilien, was Mr. Jardin in New York last week?

A I don't believe he was in New York last week.

Q When was he last in New York?

A Mr. Jardin was in New York approximately two and a half weeks ago.

Q Did he know the trial was scheduled for May 20th and 21st?

A I don't know that.

Q Did you discuss this matter with him?

A I did not discuss the trial with him.

THE COURT: Is there any issue about whether he is in Iran?

MR. MILLER: I have no idea, your Honor. I don't have any issue with it, your Honor.

THE COURT: Where is the testimony?

MR. STEWART: I have the testimony.

MR. MILLER: This is a signed copy, your Honor.

THE COURT: You are offering it in evidence?

MR. STEWART: Yes, sir.

THE COURT: It may be marked for identification at this point.

(Defendant Exhibit AM marked for identification)

THE COURT: I will rule on it before the day is out.

On the stenographer's index this deposition being ordered was taken on November 22, 1974 by plaintiff's counsel and sworn to and subscribed under date of April 22, 1975 in the State of California.

MR. MILLER: If your Honor please, I don't know -- we just received that this morning and I don't know whether there are any changes in the transcript made by the witness when he signed it.

THE COURT: Neither do I. I haven't looked at it.

DIRECT EXAMINATION CONTINUED

BY MR. STEWART:

Q Mr. Lilien, would you describe the type of business that the bank did with American IBC Corporation?

A Yes. With the exception of the two transactions which have been described in this trial the business of the bank with American IBC Corporation was conducted in connection with back to back letter of credit transactions relating to blocked currencies and all of the transactions were secured transactions.

Q Was American IBC ever a securer of credit itself?

A No, from the initiation of the relationship with American IBC it was our basic premise that American IBC could not stand as a seeker of unsecured credit and, therefore, it was our policy, which we applied consistently, to provide credit to American IBC only on a case by case basis and on a fully secured basis with each transaction having to stand on its own feet in the form of a self liquidating secured transaction.

Q What was Mr. Boland's responsibility with respect to American IBC?

A Mr. Boland was the account officer for American IBC.

Q Did he pass on all offerings by American IBC?

A Yes, it was Mr. Boland's responsibility to review all proposals brought by American IBC, to see to it that they conformed to the standard which I have described of a self liquidating secured transaction which would not rest upon the credit worthiness of American IBC.

Q Are you familiar with the two transactions in issue in this case?

A Yes, I am.

Q Would you describe them please?

A The two transactions are interest rate arbitrage transactions between U.S. dollars and swiss francs involving the borrowing of U.S. dollars at a given interest rate, the conversion of the dollars into swiss francs, their being placed on a time deposit at another given interest rate, their reconversion upon the maturity of the time deposit into dollars at an exchange rate which was fixed at the time the transaction was negotiated thereby having all of the elements of the transaction fixed at the time the transaction began and permitting the parties to the transaction to identify exactly how all the interest payments and the profit would be obtained.

Q When you describe the transaction as a secured transaction, would you state, Mr. Lilien, how the first transaction was secured?

A Yes. In the case of the first transaction the time deposit established in the name of American IBC at Wells Fargo Bank Luxembourg was secured by the specific pledge of that deposit as collateral to the bank and further by the fact that it was Wells Fargo Bank International which communicated with Wells Fargo Luxembourg to establish the deposit and was the only vehicle that could be used to communicate on the subject of deposit because the client, American IBC did not have any direct communication facilities that could be verified at Wells Fargo Bank Luxembourg.

Q In other words, even if American IBC wanted to do something with that time deposit at Luxembourg they could not, is that right?

A They could not have.

Q The only movement of that time deposit would be through your bank?

MR. MILLER: I object to the questions.

THE COURT: You are doing what Mr. Miller did, testifying for the witness. I will give it the same weight that I gave to his testimony.

Q Could that time deposit be moved other than through your bank, sir?

A No. Wells Fargo Bank Luxembourg would have required something that they could use as a verifiable evidence of the authenticity of any instruction and since we were the people who had established that deposit with them they would not have been able to verify instructions from any other source.

MR. MILLER: I move to strike the answer, your Honor. All speculation, would have required. What were the facts?

THE COURT: That is the course of the transaction. He is explaining what happens in such a transaction. You may want to explain the details also, if you wish, later on.

The motion to strike is denied.

Q Do you know whether or not Wells Fargo Luxembourg had any signature cards with respect to American IBC?

A To the best of my knowledge they had no signature cards.

Q So that if a representative of American IBC went to Wells Fargo Luxembourg what could he do with respect to that time deposit, if any?

A He would not have been able to influence the disposition of that time deposit unless there had been a process of obtaining appropriate corporate documents, certificates of encumbency, signature cards and so on.

Q Would you describe the bank's security position with the second transaction?

A In the second transaction the bank under understood thatit was secured although as the documents indicate the letter from American IBC did not specifically refer to the transaction as collateral.

The bank relied in its view that the transaction was secured upon the fact that American IBC had instructed the bank holding the time deposit, UCB in London, to pay the funds to the Swiss Credit Bank which in turn had been instructed in connection with the foreign exchange contracts to pay the proceeds of the conversion of the swiss francs into dollars to WFBI.

So that the process of providing for the funds to come to WFBI had been covered through the instructions that had been given by American IBC.

Q Mr. Lilien, I refer you to Plaintiff's Exhibit No. 3.

Can you state what that is, sir?

A This is a form which can best be described as a confirmation of a transaction and it is designed to permit our bank in Luxembourg to be sure that its records conform accurately to the records of its customer so that there can be no question about the fact that the records are viewed identically by both parties.

Q Does the holder of the confirmation or does this confirmation give the holder any rights with respect to the deposit as such?

A To the best of my knowledge --

MR. MILLER: Objection. That calls for a legal conclusion.

THE COURT: In banking practice is there anything on that confirmation which opens the door to any action on the part of theholder?

THE WITNESS: May I examine the document again, sir?

THE COURT: Yes.

THE WITNESS: There is nothing that I see here which makes this in any way a negotiable instrument. Whether or not it can be construed as a receipt, I can't say. The word that is used is confirmation of having accepted for you and then it indicates the details of a deposit.

Q I refer you to Plaintiff's Exhibit 40, in particular the document entitled confirmation dated May 16, 1973 from United California Bank.

THE COURT: What is the question?

Q Does the holder of that confirmation have any rights with respect to the underlying time deposit?

MR. MILLER: Same objection.

THE COURT: I am not taking this as a statement of what the law is but as a statement of the banking practice, I would like to know what the witness' answer is.

A Again, this document is a confirmation of a deposit that was received. It does not, on the face of it, indicate any title interest and simply does not indicate any negotiability and I just don't know what the legal implication of the document is.

Q Would you describe the bank's practices with respect to its keeping informed as to the financial condition of American IBC?

A Yes. I would say that we kept informed of the financial condition of American IBC on a rather routine basis. We did not have a continuing line of credit to American IBC. We only accepted transactions proposed to us by American IBC on a case by case basis, on a fully secured basis.

We never considered giving credit to American IBC in its own right, in its own name where the extension of credit would depend upon the general corporate viability of American IBC and as a result we did not feel that there was any particular reason for us to dig deeply into the corporate affairs of American IBC.

Q Were there any procedures for reporting on bank loans to American IBC to Wells Fargo NA?

A Yes. There is a standard procedure for reporting on bank loans and that procedure involves the filing of two reports and I would like to note that they are reports. They are not requests for approval. Those reports are the CR-38 and the CR-39.

The CR-38 is a report which is to be submitted promptly after an extension of credit has been granted and it is just a summary report.

The CR-39 is a more complete and more detailed explanation of the transaction and of information about the underlying party and that report is supposed to be submitted within a reasonable length of time after the submission of the first report.

Q I show you Plaintiff's Exhibit 26 and ask you whether that is the CR-39 report with respect to American IBC?

A Yes, I recognize this as a CR-39 report for American IBC.

Q Does that include periodic Dunn & Bradstreet reports?

A The normal procedure in this case would be to include any information that might have come to hand as a result of our regular subscription to Dunn & Bradstreet for information on this client and I see that a Dunn & Bradstreet report, a copy of that has been attached to the CR-39.

Q What is the latest date of the Dunn & Bradstreet report?

A The report bears a date on it that says October 3, 1973.

Q Does that report indicate there was any litigation involving American IBC?

A The report makes two comments that seem to be pertinent. One is on the front page --

MR. MILLER: I move to strike. It's not responsive to the question. It doesn't indicate litigation.

THE WITNESS: No, it says record clear which is the only statement I can find.

Q Does the CR-39 report indicate when it was sent to San Francisco to the head office?

A Well, the date at the top of the report would be approximately the date that it was sent to the head office in that it would be the date of the final typing and signatures should have occurred in our office shortly thereafter and it would have been sent off fairly promptly to the head office after October 31, 1973.

There is a pencil notation here which says mailed to SF 11/15/73.

THE COURT: What page is that on?

THE WITNESS: Sir, that is on the first page, about two inches down near the right-hand side of the CR-39.

The penciled notation occurs here and the date of the report is up here.

Q Mr. Lilien, between May and November of 1973 did any facts come to your attention with respect to problems respecting American IBC Corporation?

A Yes. When I was visiting Colombia in July of 1973 the representative of Wells Fargo Bank NA, Mr. Gustavo Arango, brought to my attention the fact that the Banco de la Republica, the Central Bank of Colombia and an extremely important client of our bank, was mad at Sheldon Silverston and apparently also mad at a swiss bank because a transaction which they had thought was going to be unwound smoothly had not unwound properly according to Mr. Arango's statement because the swiss bank had been unwilling to extend an expiration date on a letter of credit pending the presentation of a document which had been presented in a timely fashion.

This concerned me a great deal. Because our relationship as a bank with the Central Bank of Colombia was extremely important to us and far overshadowed the importance to us of any relationship that we had with Sheldon Silverston and American IBC.

I was very concerned that our doing business --

MR. MILLER: I move to strike about whether he was concerned, your Honor.

THE COURT: All right. Granted.

Q As a reuslt of the receipt of this information, what did you do, Mr. Lilien?

A I prepared a memorandum upon my return to New York in which I outlined the information that had been given to me by Mr. Arango and specifically requested Mr. Arango on the one hand and Mr. Boland on the other hand to get as complete information as possible on this to find out whether this ill will between the Banco de la Republica and Mr. Silverston had been resolved or not.

Q I show you Defendant Exhibit V and ask you whether this is the memorandum you prepared?

A Yes.

Q What report, if any, did you get from Mr. Arango?

A I received a brief report from Mr. Arango. The gist of which, as I recall it, was that the matter had been settled and that the Banco de la Republica had no further claims against Mr. Silverston.

Q I show you Defendant Exhibit W and ask you whether that is the report you received from Mr. Arango?

A Yes.

Q What report did you receive from Mr. Boland?

A From Mr. Boland I received a letter, some copies of letters received by American IBC itself all of which indicated that the matter had been settled and that there were no further claims against American IBC.

Q I show you Defendant Exhibit X and ask you whether that is the letter you are referring to?

A Yes, it is.

Q With the two enclosures?

A With the attachments.

2bam

Q Did any other facts come to your attention with respect to Amefican IBC between May and November of 1973?

A The only other fact that came to my attention was in a routine review of our loan documentation we found that the promissory note and assignment agreement had not been signed with regard to the second transaction and that gave rise to the letter which has been referred to previously of Mr. Hawkins requesting these these documents be signed and returned.

Q Was that done?

A The letter was sent. As far as I can tell from my review of our file I cannot find that those documents were ever returned.

Q Who is Mr. Fichou?

A Mr. Fichou is vice president of Wells Fargo Bank International, responsible for the operations division of that bank.

Q Is he still employed with Wells Fargo Bank International?

A No.

Q Where is he now?

A Mr. Fichou is currently employed by another bank in New York City. He was transferred to San

Francisco at the end of 1973 and his last days in the bank would have been shortly before Christmas of 1973 when he went on year-end vacation preceding his transfer to San Francisco.

Q What happened with respect to American IBC after November 19, 1973?

MR. MILLER: With respect to what?

Q What facts came to your attention with respect to American IBC after November 19, 1973? What was the next thing you heard?

A The next thing that I remember having heard was that we received a claim from the Swiss Bank to return to them the funds that had been remitted to us on November 19th. That claim was made by telephone and by Telex on December 5th.

Q I show you Defendant's Exhibit N and ask you whether that is the telex you are referring to in your testimony?

A Yes.

Q After receiving that telex what did you do, Mr. Lilien?

A That telex in fact was not received by me. It was received by Mr. Fichou and Mr. Boland and they acted on the basis of that telex and sent a reply over

Mr. Boland's signature on December 7th.

Q I show you Defendant's Exhibit P and ask you whether that is the reply you referred to inyour testimony?

A Yes, that is.

Q Was there a further telex from Swiss Credit Bank?

A Yes, they pursued this matter further with us and that telex was received, I believe, on the 10th or the 11th in our bank.

Q I show you Defendant's Exhibit Q and ask you whether that is the telex you are referring to.

A Yes, that is the telex that was received by us on December 11th and it came to my attention because Mr. Boland was then on vacation.

Q Did you reply to that telex?

A Yes, I replied to that telex on that day.

Q I show you Defendant's Exhibit R and ask you whether that is the telex you are referring to?

A Yes, that is the telex that I sent.

Q Did you make any notes when this problem arose, Mr. Lilien?

A Yes, I did.

Q Were they made at the time?

A Yes, they were.

Q Are they accurate?

A Yes, they are.

Q I show you Defendant's Exhibit S and ask you whether these are the handwritten notes and the later typed notes that you are referring to in your testimony?

A Yes, these are the notes.

Q Did you have a telephone conversation with Mr. Silverston?

A Yes, I had two telephone conversations, the first occurred on the 11th and the second occurred on the 12th.

Q Would you state for the record what you said to Mr. Silverston and what he said to you on the 11th?

A Yes, on the 11th I called Mr. Silverston because this claim by the Swiss Bank had been pursued by them and I called Mr. Silverston to tell him that they were claiming these funds, to point out to him that we had had those funds pledged to us and they had been paid back to us properly under the agreement that we had entered into with him and I asked him why the Swiss Bank would be making this claim on those funds. He indicated to me that their claim was in error. That he had assigned or pledged certain funds to the Swiss Bank during the course of the summer but that he had various deposits and what he had done was to assign deposits other than the one that was pledged to us and that the Swiss Bank was in error and that the money that we had received was most clearly our money.

Q Going back now to December 7th, Mr. Lilien, your first conversation with Mr. Silverston --

A I think my first conversation was on the 11th.

Q You are right. Excuse me.

Go back to December 1, if I may, and I ask you whether at that time you knew American IBC was insolvent?

MR. MILLER: Objection.

THE COURT: What did you know at that time in respect of the solvency of American IBC?

THE WITNESS: I knew nothing of significance with respect to the solvency of American IBC.

Q Did you know of any facts which would lead you to believe that American IBC was insolvent as of December 1, 1973?

A No, I did not.

THE COURT: If you had known on May 1, 1973 that this concern was insolvent and had these problems that have been portrayed here under the course of business between the bank and American IBC, was a loan transaction as was entered into within the perimeter of the business dealings that the bank was prepared to do?

THE WITNESS: Sir, if we had known that they were insolvent and were in any kind of serious difficulty we would not have had any transaction.

THE COURT: Even on a case-by-case basis?

THE WITNESS: No, sir.

THE COURT: Not even on a secured basis?

THE WITNESS: As a matter of policy we would not deal with someone who was in serious financial difficulties if we had known it.

THE COURT: All right.

Q I show you Defendant's Exhibit U and I ask you whether that is the letter from Swiss Credit Bank that you are referring to in your testimony?

A Yes, it is.

Q What is the date of that letter?

A This letter was dated in Switzerland on December 10th and our date stamp shows that it was received on December 12th.

Q Was there an enclosure with that letter?

A Yes, there is an enclosure. It is a copy of a telex machine conversation. The date stamp on it indicates 29 August '73, and also the telex indicates 29 August 1973.

Q What does that telex indicate to you?

MR. MILLER: Objection, your Honor.

THE COURT: I don't think that that would be a permissible form. The objection is sustained.

Q After reading that telex what did you understand had happened?

MR. MILLER: Objection.

THE COURT: After reading the telex did you take any action?

THE WITNESS: Yes. After reading the telex I checked the details of the transaction described in the telex against the details in our records to try to determine whether the funds mentioned in that telex could be identified as the same funds that we identified in our records. Of course, I found that they did coincide. It was affirmative that the figures mentioned and the dates mentioned were the same as the figures mentioned in our records.

I immediately did two things. I called Mr. Silverston -- well, I had also spoken on the telephone that day with a gentleman at Swiss Credit Bank. They had pointed out to me what was contained in this Telex and they had also pointed out to me that it appeared to them that the same money had been pledged twice to two different institutions for the purpose of obtaining a loan and they suggested that if that were the fact, that Mr. Silverston was a crook.

I called Mr. Silverston and pointed out to him that we had this documentary evidence in hand now which would indicate to us that he had pledged the same funds to two different organizations and told him what the Swiss banker had said about this suggestion that he was a crook.

Mr. Silverston reiterated that he had not pledged the same funds to two different institutions, that he was not a crook, and that the money we received was indeed our money.

Q Thereafter did you take any further action?

A Yes, I wrote a memorandum to all the officers and section heads in the bank telling them that there were to be absolutely no further transactions with American IBC or with Mr. Silverston and that anything relating to American IBC or Mr. Silverston was to be referred personally to me.

Q I refer you to Defendant's Exhibit T and ask you whether that is the memorandum that you wrote?

A Yes, that is the memorandum.

Q Mr. Lilien, with respect to Defendant's Exhibit S, the notes you referred to in your testimony, can you explain or will you tell me how your handwritten notes got into the typewritten form and when that happened?

A Well, they got into the typewritten form at my request. As you can see, the top part of that page represents the material which isn't in the written report. It is background material. It was typed at my request and typed shortly after I had made these notes. I can't tell you exactly when.

Q Within a matter of a few days, approximately?

MR. MILLER: Objection as leading.

THE COURT: "When"would be a better way of putting it.

A I would say within a week or so.

MR. STEWART: No further questions.

MR. MILLER: May we take a five-minute recess?

THE COURT: Yes.

(Recess.)

CROSS EXAMINATION

BY MR. MILLER:

Q Mr. Lilien, how long have you been with Wells Fargo Bank International?

A I joined Wells Fargo Bank in June of 1969 and I arrived in New York on the first part of September -- I took charge of New York the first part of September, 1969.

Q Were you with Wells Fargo Bank, N.A. prior to that?

A I was hired in order to take over the adjunct here in New York, but I spent three months on orientation in San Francisco.

Q Prior to that time?

A I was employed by a bank in Chicago.

Q What bank?

A Continental Illinois National Bank & Trust Company of Chicago.

Q What capacity?

A Vice president of the bank, responsible for the Latin-American division.

Q What is your educational background?

A I have a bachelor's degree in foreign affairs and a master's degree in economics.

Q Do you have any legal training?

A I do not.

Q Mr. Lilien, turning to the transactions between Wells Fargo Bank International and American IBC Corp., you testified in response to Mr. Stewart's questions as to the first transaction that the bank was secured by a pledge of collateral, is that correct?

A Yes, I did.

Q What was the pledge?

A The pledge was the statement in the letter exchanged between the bank and Mr. Silverston that the time deposit at Wells Fargo Bank Luxemburg was collateral to the loan.

Q That was the pledge?

A Yes.

Q Were the instructions irrevocable?

A Well, the instructions were given to us that it was collateral. I would take them to be irrevocable, yes.

Q Did it say it was irrevocable?

A No, it did not.

Q You testified, Mr. Lilien, that if Mr. Silverston or American IBC attempted to get that time deposit there would have been some problem at Wells Fargo Luxemburg?

A Yes, that is right.

Q How do you know that?

A Because banks will not move funds unless they are satisfied as to the validity of the instruction being received.

Q That is a surmise or a conjecture?

A Standard banking practice.

Q Let's take the hypothetical, Mr. Lilien on the basis of your banking experience. Suppose a judgment creditor showed up at Wells Fargo Luxemburg with a judgment to attach the time deposit. What would have happened?

A I don't know because I don't have any experience in that regard.

Q In whose name was the time deposit?

A The name of American IBC.

Q Mr. Lilien, the first transaction was May 2, 1973?

A That is right.

Q I show you Exhibit 54, the CR-38.

A Yes.

Q When was that CR-38 prepared?

A That is dated October 19, 1973.

Q Why is CR-38 prepared?

A CR-38 is prepared in order to make a report of transactions that have been entered into by the bank.

Q That is the regular practice to do that in the bank?

A That is right.

Q When do you make that report?

A As soon as conveniently possible after the transaction itself.

Q I call your attention, Mr. Lilien, to the bottom part of CR-38, the note. Would you read that, please?

A I am sorry. I am not sure what you are pointing to.

Q Where it says N-o-t-e: "This is a preliminary report --

A "This is a preliminary report, completed CR-39 CR-39A" -- something I can't read there --

"must be sent" -- I can't read it again -- so many days after the filing of this report.

Q Doesn't it say "must be sent to division within one week of commitment"?

A Well, in all honesty, I really can't read what is down there. If we can get a clearer copy I would be glad to read it. "Must be sent to" --

Q --"division,"d-i-v-i-s-i-o-n,"within one week of commitment?

A ". . .within one week of commitment," I can read that, yes.

Q So the statement is this is a preliminary report --

A "Completed CR-39, CR-39A and"-- can you make that out?

Q 27A.

A -- "must be sent to" -- and I really can't read that word; if it says "division," okay -- "within one week of commitment," right.

Q This was prepared on October 18, 1973 in connection with commitments which had been made in May of 1973?

A That is right.

Q That is the standard bank practice?

A That is not, but in this particular case, in view of the fact that these were secured transactions other work inolving reports on loans that seeme more significant to the bank took precedence over it and this was delayed, which occurs when we are short of personnel.

Q You are saying secured in your understanding as a layman?

A I am saying secured in my understanding.

Q And the security in the first transaction was the statement in the letter from Mr. Silverston?

A And the exchange of letters between Mr. Silverston and Mr. Boland as well.

Q When the time deposit matured, Mr. Lilien, on the first transaction, what did Wells Fargo Bank Luxemburg do with the matured proceeds?

A Wells Fargo Bank Luxemburg arranged to have the proceeds transferred to Swiss Credit Bank in accordance with instructions that had been given.

Q Do you know what happened to the proceeds of Swiss Credit Bank?

A Internally at Swiss Credit Bank?

Q Do you know?

A I don't know what happened internally.

Q Was Swiss Credit Bank your agent, Wells Fargo Bank International?

A Are you asking me a legal question?

Q You seem to be answering legal questions. Did you ask Swiss Credit Bank to be your agent?

A Did we ask them to be our agent?

Q Yes.

A No, we did not specifically ask them to be our agent.

Q You did not?

A No.

Q Mr. Lilien, was there a pledge on the second loan transaction?

THE COURT: Have we finished on the first transaction? You wanted to know what Wells Fargo Bank Luxemburg transferred to the Swiss Bank, the Swiss Credit Bank. What did they transfer? Who was credited and when and what resulted from that transfer?

I think these are things that I would like to know what the details are without the forensic exercise.

Q Mr. Lilien, what is Wells Fargo Bank Luxemburg?

A It's a branch of Wells Fargo Bank, N.A.

Q It is not a subsidiary of Wells Fargo Bank International?

A It is not.

Q Would you tell me what Wells Fargo Bank Luxemburg did with the proceeds of the time deposit?

A Yes, insofar as I know, Wells Farbo Bank Luxemburg would instruct its banker in Switzerland where it maintains its Swiss franc account to pay the given amount of Swiss francs out of the account of Wells Fargo Bank Luxemburg to Swiss Credit Bank identifying the transaction as for credit of American IBC Corporation and probably, although I am not sure of this, would have further identified the transaction with some reference to our time deposit or to an exchange contract. That I cannot speak to because I don't have personal knowledge of it.

THE COURT: Don't the exhibits here show that immediately upon the receipt of that transfer of the time deposit they paid dollars over to Wells Fargo International? Do you know that?

THE WITNESS: Sir, all I know is that Swiss Credit Bank had instructions to take the Swiss franc side of an exchange contract, convert that into dollars and pay those dollars to us. As far as I know, they did exactly what they were instructed to do. They took the incoming Swiss francs, converted it into dollars and under the exchange contract they entered into and remitted those dollars to us. What internal procedures they go through, I just don't know.

Q I show you Exhibit 37. By the way, you are engaged in international banking?

A I am.

Q You understand the dollar currency market and Swiss franc currency market?

A I understand some of it. I can't claim that I understand all of it.

Q I show you Exhibit 37, dated November 2, 1973. Can you tell us what that document is?

A Well, I can recognize that it is a document issued by the Swiss Credit Bank.

Q What does it reflect?

A I am trying to figure out. It seems to be a confirmation of the arrangements on a forward foreign exchange transaction. It is addressed to American IBC Corporation. It indicates that American IBC Corporation to the Swiss Credit Bank 3,308,850 Swiss francs on November 2nd. It shows the exchange rate that will be applied and it indicates that Swiss Credit Bank will liquidate that foreign exchange contract by delivering $1,042,814.37 in U. S. currency, that it will be liquidated through Chase Manhattan Bank to Wells Fargo Bank, Ltd., it says here, in New York.

It indicates what the exchange rates are that have been applied. It indicates the account numbers and I read this to be the Swiss Credit Bank's confirmation of a forward exchange contract.

Q I show you Exhibit 3, Mr. Lilien. Do you know what that document is?

MR. MILLER: That is dated, your Honor, April 30, '73, contract No. 42781.

A This is the ocnfirmation of the time deposit issued by Wells Fargo Bank, N.A. It confirms the details of the time deposit that was received from American IBC. It indicates where the funds are going to come or where the funds should be paid to in order to create that time deposit, and it does not indicate where the time deposit is to be paid to upon liquidation; at least not on this confirmation.

Q That is referred to on the document as a contract?

A Yes, that says contract number. This form is probably used for foreign exchange contracts as well as time deposit contracts.

Q When Wells Fargo Bank Luxemburg received the Swiss francs was there any restriction on the use of those Swiss francs by Wells Fargo Luxemburg?

A I am sorry, when you say on the use of it -- they become the general funds when they are received by the bank. They belong to the bank. Are you indicating the deposit?

Q The bank uses it for whatever business?

A That is right.

Q It did not stay in the same form?

A That is right.

Q On the first transaction I think you testified that the moneys were paid by Swiss Credit Bank, dollars were transferred to New York, is that right?

A That's right.

Q To whom were they transferred?

A Obviously, from as far as I can see from these forms, Swiss Credit Bank instructed the Chase Manhattan Bank, which is their principal bank of account in New York, to effect the payment of the dollars to us.

Q To you?

A Wells Fargo Bank, yes.

Q What did you do with it? I give you Exhibit 22 so you can refresh your recollection, if you don't have one.

A Well, when we receive funds, we pass debits and credits, according to whatever the instructions are. These tickets probably reflect those.

Q Those tickets reflect a credit to the account of American IBC Corp.?

A Yes, they do and they should.

Q Of how much?

A The ticket dated November 2nd?

Q Yes.

A That represents a credit to the account of American IBC Corporation, $1,042,814.37.

Q At some point in time on November 2nd there was a credit balance of at least that amount in the account of American Credit Corp.?

A It's conceivable the account could have been debited before it was credited.

Q Is it the regular practice of the bank to debit accounts before they are credit or debit accounts when there are insufficient funds?

A If tickets arrive simultaneously in the accounting section so the accounting section can see that credits and debits have approximately equal value being put there, I don't know they have any particular --

Q They can do it either way?

A I think they can so long as they have the tickets in front of them.

Q The moneys were credited to the account of American IBC Corp.?

A Yes, indeed.

Q And they were in effect by bookkeeping entries debited and taken out of the account and used to repay Wells Fargo Bank International, is that correct?

A That is correct.

Q Mr. Lilien, are you familiar with banking arrangements whereby a bank may be authorized by a lender to debit its account on the first of every month to liquidate a loan?

MR. STEWART: I didn't hear.

A You said a lender --

Q Let's assume, Mr. Lilien, that a borrower of a bank borrows $1000 to be paid over 10 months in equal payments of $100 each and authorizes the bank to debit the account of the borrower on the first of each month rather than taking a ticket out of a book, are you familiar with that?

A Yes.

Q Is that a pledge of the account?

A No, I would not take it to be so.

Q In the second transaction --

THE COURT: What relationship has that question and that answer got to do with this?

MR. MILLER: All the documents establish, and what Mr. Boland testified to yesterday, your Honor, that Wells Fargo Bank International was relying upon the execution of the underlying agreements. They were relying upon an executory promise that when the money got into the account on the circle of each transaction, the account could be debited. That is not an assignment, not interest, and it is not a pledge.

THE COURT: That is one way of saying it, but you can say it another way where you have a completely locked up transaction. What you are describing is a series of bookkeeping entries involving agencies on parol and it may become important to determine whether you can accomplish what you want to accomplish by parol understanding as well as by the pieces of paper.

As nearly as I can make out here --

MR. MILLER: Not binding on a hypothetical lien credit which is the trustee in bankruptcy. There is no valid pledge here which a judgment creditor could not have upset.

THE COURT: There may be some case law that I will call to your attention in that regard at another time. I wouldn't be so sure of my assertion despite your great proficiency in the field which I can recognize.

MR. MILLER: Thank you, sir.

Q Mr. Lilien, on the second transaction, and I show you Exhibit 9, May 15, 1973, is that the basic loan document?

A Yes, this is.

Q Is there any mention in that document to collateral?

A No, there is not.

Q What collateral did the bank receive? Do you contend there was collateral?

A Yes.

Q What was the collateral?

A The time deposit of UCB and the arrangements relating to the payment of the funds from the time deposit into the prearranged exchange contracts with Swiss Credit Bank involving the return of the money to us for the payment of the loan.

Q This was a pledge, sir?

A As the transaction was described to me as a secured transaction, the indication was to me that this time deposit had in fact been pledged for that purpose. I do not find in this letter that there is any reference to a pledge or to collateral.

Q How was the pledge perfected?

MR. STEWART: Objection. That is a legal conclusion.

THE COURT: Sustained.

Q Do you know what perfection is?

A I have an idea of what perfection means under certain circumstances but I am not a lawyer and I have no idea what the ramifications of it are in all cases.

Q Isn't it a fact that this was the first -- withdrawn.

Prior to the first transaction in May, this was the first time the bank had ever engaged in any kind of transaction like this?

A That is right.

Q Did the bank consult Wells Fargo Bank Interantional, any attorneys concerning that?

A No, it did not.

Q It did not obtain any opinions as to the validity of the collateral interest?

A No, it did not.

Q Mr. Lilien, I show you Exhibit 40, which are the documents between American IBC Corp. and United California Bank, the second document marked 40B. Did you ever see that document before?

A Well, I know that I have seen a copy of a confirmation from United California Bank which was attached to material sent to us by Sheldon Silverston. Yes, I think I have. We received copies of the confirmation of the time deposit and copies of his telex exchanges with Swiss Credit Bank referring to this transact on as part of the material that he sent to us and so I am quite sure that I have seen this before, yes.

Q This document dated May 15, 1973 to United Caliifornia Bank London from American IBC, that document is the directions to United California of what to do with the proceeds of the time deposit, isn't that correct?

A Yes, we saw this and it was sent to Swiss Credit Bank and to Meridian as well.

Q And the proceeds were to be remitted to Swiss Credit Bank in favor of American IBC Corp.?

A Yes, to the attention of Mr. Ribi, the man who entered into the foreign exchange contract between Swiss Credit and American IBC.

Q Did Wells Fargo Bank International have any agreement or request United California Bank to act as its agent?

A No, we did not.

Q On November 19, 1973 did the proceeds of the second transaction -- were they received in New York?

A Yes. As I understand it, they were received in exactly the same manner that the proceeds of the first transaction were.

Q There was a credit to the account of American IBC Corp.?

A There was a credit and a debit exactly the same way as the first transaction.

Q If you will compare Exhibit 9, or if you look at Exhibit 9, is there any reference in that letter to enclosures in respect of the nature of the time deposit?

A There is at the bottom of the first page:

"For your information, we also attach copies of documents pertaining to this transaction, including our purchase of Swiss francs from Swiss Credit Bank value May 17th."

The next document is 2, our instructions to Swiss Credit Bank to deliver the Swiss francs to the account of United California Bank for time deposit.

3, our instructions to United California Bank London to pay the Swiss francs, principal and interest, to Swiss Credit Bank-Zurich value November 19th.

And the fourth one, our purchase of dollars from Swiss Credit Bank-Zurich with the above Swiss franc proceeds and instructions to Swiss Credit Bank-Zurich to pay you the full dollar credits in New York.

Q I show you Exhibits 10, 11 and 12. Aren't those the enclosures included with the letter?

A Yes, I believe these are.

Q So the c onfirmation between Swiss Credit Bank or United California Bank and American IBC were not included with the letter?

A I am sorry?

Q The confirmation that you described before, the document you just looked at.

A This telex is a Xerox copy of a telex exchange between two parties, between Sheldon Silverston and Mr. Ribi. There would eventually have been issued by Swiss Credit Bank their form of confirmation but the telex itself constitutes the contract.

Q In your view?

A I believe in the general practice of the international banking community. In the trading of foreign exchange a telephone conversation between traders or a telex exchanged between parties is viewed as the deal, as the contract. The paper that is sent afterwards is a confirmation to make sure everybody has recorded the contract.

Q The contract is essentially executory promises back and forth?

MR. STEWART: Objection.

THE COURT: Sustained.

Q What is your definition of a contract?

MR. STEWART: Objection.

THE COURT: Sustained.

Q Is it your testimony, Mr. Lilien, that Exhibit 40B, which comes out of Exhibit 40, was received by the bank?

A Yes, I believe this was received by the bank.

Q Do you know when?

A I am sorry, I can't tell you.

Q It is not referred to in the agreement, Exhibit 9, is it?

THE COURT: What is the date of Exhibit 9?

MR. MILLER: May 16th, your Honor.

THE WITNESS: It is not referred to and, as a matter of fact, the dates are different. This is a letter of May 15th and this is May 16th, so it would not be included with this letter.

Q By the way, Mr. Lilien, is it the regular practice of the bank to time stamp receipt of documents?

A Yes, it is. Or to date stamp them.

THE COURT: You referred to an agreement of May 16th.

MR. MILLER: It's a one-sheet item included as part of Exhibit 40.

THE COURT: This isn't agreement, this is a confirmation.

MR. MILLER: The witness referred to it as an agreement.

MR. STEWART: Objection to that, your

Honor.

THE COURT: The witness can tell me that day was Thursday and if I know that day is Wednesday, I can't be bound by that when my eyes tell me that the word on top of it is "confirmation." I don't want to be misled about it.

MR. MILLER: Confirmation of an agreement, your Honor.

THE COURT: Confirmation of an agreement, that is a different thing. But your question put it in a way, and I want to follow this testimony as given.

Q Is there any reason, Mr. Lilien, why Exhibit 9, the agreement of May 15, 1973 was not time stamped?

THE COURT: I am going to take exception to that statement. I don't know why you ask these questions in that form and then expect me to be bound by your misstatement of what the paper is. This is a confirmation.

MR. MILLER: I am referring to this document, which is an agreement, your Honor. Exhibit 9, May 15th, this is the loan.

THE COURT: I am sorry. I thought you said May 16th.

MR. MILLER: I would not intentionally

do that, your Honor.

THE COURT: All right. I am sorry.

Go ahead.

A Do you want me to explain why?

Q If you know.

A I can give you a probable explanation.

Q Never mind.

Mr. Lilien, you stated that the Banco de la Republica was a major client of Wells Fargo?

A That is right.

THE COURT: Are you going to be a little while yet?

MR. MILLER: Yes, sir.

THE COURT: Let's suspend now for lunch and return at 2 o'clock.

Is that all right or would you prefer 2:15?

MR. STEWART: That is fine, sir.

(Luncheon recess.)

AFTERNOON SESSION

2:15 P.M.

CHARLES E. LILIEN, resumed.

THE COURT: All right, Mr. Miller.

CROSS EXAMINATION CONTINUED

BY MR. MILLER:

Q Mr. Lilien, in connection with the two loan transactions between Wells Fargo Bank International and American IBC Corporation, did Wells Fargo Bank International request that American IBC Corporation execute any statements in the Uniform Commercial Code?

A It did not.

Q Do you know what a financial statement is?

A I have general knowledge, yes.

Q What is it?

A It's a statement by a borrower to the effect that he has pledged certain assets which are enumerated and which is then filed so as to put it on public record.

Q You did not request any such?

A We did not.

Q Mr. Lilien, can you tell us what the purpose of the Cr-39 is?

A Yes, the CR-39 is a report on credit extended to customers.

Q What is the purpose of it?

A The purpose of it is to inform the loan review committee, which is established for the lending entity and other officers who may be interested in keeping track of the transactions of the lending entity.

Q Does it go to any committees?

A It goes to the loan review committee.

Q For what purpose?

A So that they may review it and if they believe that the credit was inappropriately extended they may comment on it or if they do not believe that it was inappropriately extended they will simply indicate that it was reviewed without comment.

Q Based on the CR-39 marked in this case, October 31, 1973, Exhibit 26 at the time that the loan was extended to American IBC Corporation based upon that document, what was the net worth of American IBC Corporation?

A This document indicates that the net worth as of 5/31/72 was $105,000.

Q That was approximately the year prior to the loan being advanced or the loans being advanced?

A That is exactly right.

Q Did the bank make any inquiry as to what the then current financial condition of American IBC Corporation was in May of 1973 that is?

A I didn't get involved in making that inquiry. I don't believe that Mr. Boland made such an inquiry because he was aware that the year did not close until May 31, 1973 and of course these transactions preceded that year end.

Q Did the bank make any request for any interim financial statements?

A To the best of my knowledge none were requested.

Q The bank was lending $2 million to a company having a net worth of $104,000 the year before.

Q It was doing that and had engaged in other transactions of substantial magnitude on a secured basis when a company had a net worth even smaller.

Q Did you make any inquiry, you, the bank, as to whether the financial condition of IBC Corporation had improved during the fiscal year ending May 1973 or deteriorated?

A To the best of my knowledge no such inquiry was made.

Q Isn't it a fact, Mr. Lilien, that on May 11, 1973 the bank was aware of the controversy in Colombia over the Colombian assets?

A When you say the bank --

Q Mr. Boland, the account officer.

MR. STEWART: I object to that.

THE COURT: Sustained.

Q I show you Exhibit 15, May 1, 1973.

Did you ever see that letter before or a copy of it?

A Yes, I have, I believe.

Q When did you see it for the first time?

A I can't tell you exactly. I just don't know when it was.

Q It was in the bank's files?

A I believe it's in the bank's files.

Q Is it the usual course of business for the bank, Mr. Lilien, to make a $1 million loan and not have a promissory note signed at the time of the advancing of the loan?

A On occasion where we are dealing with an individual or a company that we trust and that we have dealt with before and who has delivered documents required as agreed we have advanced funds to meet a particular deadline without having promissory notes in hand.

Q And you trusted American IBC for it?

A We trusted Sheldon Silverston.

Q You trusted Sheldon Silverston?

A We did.

Q Did you ask Mr. Silverston to execute a promissory note, the bank?

A To the best of my knowledge, yes.

Q Is that Exhibit 18, August 3, 1973?

A That, as I understand it, is a followup and I believe that there was an oral request to sign a promissory note which must have occurred at the time of the original transaction. This I understand is a followup letter on that.

Q Did American IBC Corporation sign a promissory note?

A As far as I can tell from the review of our files we did not receive the signed promissory note in response to this letter.

Q Did you trust Mr. Silverston after August when he did not sign a promissory note?

A I certainly attached no special significance to his not returning the document since we had the letter which acknowledged the debt and clearly indicated his promise to repay.

Q And you relied upon his promise to repay?

A Yes, we did.

Q Mr. Lilien, when was the first time you learned of the financial problems of American IBC Corporation?

A The first time that I learned of any significant financial problems was when we received the request to return the funds to Swiss Credit Bank and we made our inquiries into that matter.

Q I show you Exhibit 29, a memorandum dated July 28, 1973.

Did you write that memorandum?

A Yes, I did.

Q And you said that Banco de la Republica feels that American IBC did not deal within confidence and has severed relations with them.

A That is right.

Q And Banco de la Republica is a major client of Wells Fargo?

A That is right.

Q You testified this morning that you were advised by Mr. Boland and Mr. Arango that the matter of the Bulgarian swap or switch had been resolved, is that correct?

A Yes, indeed.

Q Did you make any inquiries as to the terms of the resolution?

A No, we did not but when we were sold in the both instances all claims against American IBC was withdrawn.

Q Who told you that?

A In one case, the memorandum from Mr. Arango and in the other case was in a letter attached to the correspondence sent us by Mr. Silverston.

Q Did you speak to the Banco de la Republica?

A I did not.

Q Do you speak to them on a regular basis?

A No.

Q Did you make any inquiry? That is subsequent to that date at that bank.

A Mr. Arango made the inquiry at my request.

Q Did you make any inquiry as to whether relations had been restored?

A No, I was satisfied with the reference to the fact that the matter had been settled and there were no further claims.

Q So from let's say August 1, 1973 to the end of '73 you made no inquiry of Banco de la Republica?

A I did not.

Q Who was Raphael Gama?

A He is an officer of the Banco de la Republica. He is in charge of their international division.

Q Do you speak to him on a regular basis?

A Not regularly.

Q How often?

A In the last six years I have spoken to him four, five times.

Q Did you speak to him in 1973?

A In 1973 I saw -- I spoke to him by telephone in London and as far as I can recall the next time I spoke to him was in early 1974 in response to a telephone inquiry by him with regard to American IBC.

Q In 1974?

A That was in January of 1974.

Q So it is your testimony the first time you learned of the financial difficulties was December 11, 1973?

A It might well have been on December 5th, 6th or 7th when the original telegrams came in from Swiss Credit Bank.

Q Maybe I can refresh your recollection.

Is Exhibit S, December 11th, the typewritten memorandum and the handwritten memorandum --

A Yes.

Q Does that refresh your recollection as to whether it was the 11th or the 5th of December?

A Well, as far as I can see from this it probably was not the 5th and it seems Mr. Fichou handled that on the 5th but I would say that by the 7th I must have been aware of this as a result of conversations with Mr. Boland.

Q You had a conversation with Mr. Boland on or about the 7th of December?

A I believe so.

Q What did you say to Mr. Boland and what did he say to you?

A The gist of the conversation, as best I can remember, is that we had received this claim. Mr. Boland had looked into the matter and Ihad been assured that the funds did indeed belong to us and there had been some mistake made --

Q Tell us what you said to him and what he said to you.

THE COURT: Don't cut him off in the middle of an answer, please.

A -- by Swiss Credit Bank.

Q Do you recall what you said to Mr. Boland?

A I cannot reconstruct the dialogue exactly but the gist of the conversation was along that line.

Q What did Mr. Boland say to you?

A The gist of it was what I have indicated, that Mr. Boland had inquired into the matter and had been assured that the funds were properly ours.

Q That was the entire conversation?

A To the best I can remember.

Q Did you give Mr. Boland any directions?

A No, not at that time except to make sure we had responded to the Swiss Credit Bank.

THE COURT: Is this a new exhibit?

MR. MILLER: No, your Honor, the tab fell off. It's a telex, your Honor.

THE COURT: I have got it.

Q I show you Exhibit P, Mr. Lilien.

Did you discuss that telex with Mr. Boland?

A I don't recall discussing the exact language of the telex with Mr. Boland.

Q Did you read the exact language of the telex on December 7th?

A I don't know whether I sent it on September 7th or not.

Q Would you look at Exhibit S, your memorandum, paragraph 2, does that refresh your recollection?

A Paragraph 2 does not refresh my recollection as to whetehr I saw this telex on December 7th because paragraph 2 simply narrates a series of events.

Q You don't have any recollection?

A I am sorry, I cannot testify positively that I saw that telex on that day.

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Q What happened after December 7th, Mr. Lilien? You can refer to your memorandum.

A On the 11th we received a Telex expressing this matter again and that came to my attention because Mr. Boland was away and, as you can see from my notes, I took several actions. I spoke to Mr. Silverston about it. I called the New York representative of the Swiss Credit Bank who said he didn't want to discuss the matter and I saw to it that a Telex was sent on that date back to Swiss Credit Bank.

Q You saw to it that the Telex was sent?

A Yes, indeed I drafted that Telex.

Q That is Exhibit R, December 11, '73?

A That's right. Yes.

Q Did you discuss, before you sent the Telex, the contents of that with anybody?

A Yes, I'm sure I discussed the contents with Mr. Fichou who is the operations officer and who had been involved in one of the telephone conversations previously and I may well have discussed the contents with the other people in the office.

Q What did you say to Mr. Fichou?

A What I said to Mr. Fichou in general was, "What have you done about this, and where does this matter stand at the present time? Please give me the files on this so that I can dig into it."

Q Did he give you the files?

A He gave me the material I needed, yes.

Q You said where do we stand on this?

A Yes.

Q What did he say to you?

A He indicated that he had spoken to the New York representative, pointed out that Mr. Boland had sent a Telex and said that obviously a mistake had been made by the Swiss Credit Bank.

Q And you received the files and then you went through the files?

A I did.

Q Did you see Mr. Boland's Telex when you went through the file?

A I'm sure I did.

Q Do you recall reading it?

A I'm sure I read it at that time.

Q Was it based upon your -- well, what did you do after that?

A After reviewing the files I drafted this response.

Q Did you consult with anybody outside the office concerning that Telex, Exhibit R?

THE COURT: You fellows just rattle on, both of you as though this reporter is in the position to take this down at about five hundred words a minute. Take it easy. We are going to get through just at the same time. Just slow down. Have a little concern for the reporter.

A As I have indicated, I called Mr. Silverston. I also reached Mr. Bolard, the representative of the Swiss Credit Bank and I don't recall speaking to anyone else outside the office.

Q Mr. Lilien, do you know when the Loan Committee of Wells Fargo meets?

A The Loan Committee meets weekly.

Q Do you know what day of the week they meet?

A I don't recall at that time what day of the week it was, no. It has a regularly fixed date, but at that time of the year in '73, I don't remember what the fixed date was.

Q If there is a CR-39 report to be considered by the Loan Committee on a particular day which involves Wells Fargo Bank International in New York, is there any communication between the Loan Committee and yourself?

A As a matter of fact, no. The form, the CR-39, is sent to San Francisco to be processed there and in due course presented to the Loan Committee and we do not know on what day it is presented to the Loan Committee and they do not consult us about the transaction.

Q Was the CR-39 for American IBC Corp, Mr. Coutsantonis prepared, that had been forwarded to San Francisco?

A As I understand it, from the notes on the CR-39, it had been forwarded approximately the middle of November, yes.

Q And had it been approved by December 11th?

A At that time I was unaware of what action had been taken. I think there are notes on the form somewhere in the file which indicate it was in fact reviewed by the Committee on December 11th.

Q When you learned of the financial problems of American IBC, did you get in touch with anybody in San Francisco?

A I did not. The transaction was a closed transaction.

Q Did you read in connection with this trial any of the depositions that were taken, Mr. Lilien?

A I have read --

MR. STEWART: Objection.

THE COURT: Overruled.

This is cross examination.

A Yes, I have read some of the depositions.

Q Did you read Mr. Lobonov's deposition?

A I read his deposition.

Q Mr. Lilien, I show you Exhibit 25, a letter dated November 21, 1973, to Dr. Stanley J. Foster, financial economist, Sunkist Growers, Inc. Did you ever see an original or a copy of that letter?

A I have seen a copy of that letter.

Q Did you see it on or about November 21st?

A I have no specific recollection of having seen it on or about that date, but I might well have.

Q Do you remember reading from Mr. Lobonov's deposition on page --

THE COURT: I don't think it would be appropriate to question this witness about the other witness' testimony in that form.

MR. MILLER: I withdraw it, your Honor.

Q Did you discuss that letter with Mr. Lobonov?

A I have no recollection of having specifically discussed this letter with him.

Q Do you remember saying to Mr. Lobonov "Nick, what is this news?"

A I have no specific recollection of that. I can tell you what might have happened.

Q Don't tell me what might have happened.

Do you remember saying to Mr. Lobonov "How do you know about it"?

A I don't have any specific recollection of that conversation.

Q Do you remember saying "How can you be sure this is the case"?

A I have already testified that I have no specific recollection of that conversation.

Q When was the first time you saw thatletter or a copy of it, the November 21st letter?

A You didn't ask that question before. My specific recollection is that I saw that letter at the time that our counsel was reviewing our files and was bringing to my attention material in the files.

Q Do you remember being deposed on November 6, 1974?

A I do.

Q Do you remember signing the deposition in January of 1975?

A I do.

Q Do you remember being asked about that letter at page 81, line 5?

"Q You had never seen that letter before?

"A I had not, no, I had not."

A Yes.

Q Was that testimony true at the time?

A You're asking about whether I had seen it before the time it was presented to me at the deposition?

Q Yes.

A Was that the question that was posed that I had never seen it before the time of the deposition?

Q Do you want to read the deposition?

A I would like to.

Q Look at pages 80, and I will mark it in my copy.

THE COURT: It is before December 5th. The context of the deposition is for that question you have never seen this letter before December 5th.

MR. MILLER: I'm sorry, your Honor, I didn't see that.

Q Is this the approval document that you referred to, Mr. Lilien? That is Exhibit 55.

A I have not referred to this document before.

Q You say that you believe that the file had an approval which was given on December 11th.

A This document indicates that the American IBC Corporation transactions were reviewed by the Loan Committee on December 11th, yes.

Q And the document is dated December 11th, correct?

A The document says --

Q Is this the date?

A The document says that when the Loan Committee met and considered these matters.

Q What is "concurring C.E. Lilien" mean?

A That means I signed the CR-39 and you will find my signature on it.

Q This document, Exhibit 55, is that then forwarded back to Wells Fargo Bank International?

A In due course it returns to Wells Fargo Bank International to be put in the credit file.

Q Were you aware, Mr. Lilien, that Mr. Lobonov was having discussions with Mr. Silverston concerning other transactions?

MR. STEWART: Could we have the time and place?

THE COURT: Where and when?

Q November 1973.

A Was I aware in November that Mr. Lobonov was having discussions with Mr. Silverston about other transactions?

Q Yes.

A I don't specifically recall that I was aware of that but of course I am now.

Q Were you aware that Mr. Silverston was having discussions with Mr. Vanveerson?

A I have a vague recollection of a brief conversation with Mr. Vanveerson about the Dominican Republic transaction that was proposed to us which we concluded was not really of interest to the bank.

Q When did you conclude that?

A Shortly after the transaction was presented to us.

Q When was the transaction presented to you?

A Based on the testimony that I have heard here today --

Q Do you know?

A Based on my recollection from that time, I could not specify that date.

Q I want to clear up one thing, your Honor.

On that letter of November 21st, did you see that letter when you reviewed the files in connection with the Swiss Credit Bank Telexes?

THE COURT: When you reviewed the file? Are you talking about for purposes of this trial?

MR. MILLER: For purposes of sending that Telex. December 11th or December 12th, I would take it.

A I doubt very much that I saw that letter. WhatI was looking for was specific information relating to the transactions in question. I wasn't trying to read the whole file for miscellaneous correspondence. I might have seen it but I would not have focused on it.

Q Is your name the first name on the circulation for the bank?

A It is.

Q You are the first one to receive copies?

A I am.

Q Were you in New York on November 21st?

A I was.

Q Were you in New York on November 22nd?

A I was.

Q Documents and correspondence which go out of the bank on one day, they usually go in circulation the next day?

A They are on circulation the next day or I may read them promptly or with a few days delay but it was my practice to read all those circulating files within a reasonable length of time.

MR. MILLER: I have no further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. STEWART:

Q I show you Defendant's Exhibit AD, Mr. Lilien --

THE COURT: I have asked you to give me the dates of these so I can follow what you're doing.

Q Remittance instructions, dated November 2, 1973.

Would you describe that document, please.

A This is what in banking terms would be called an advise or advise ticket.

THE COURT: Is this the one that is in German?

MR. STEWART: It has four languages, your Honor, I believe.

THE COURT: What exhibit is it?

MR. STEWART: AD, your Honor.

THE COURT: I have it now.

Go ahead.

A This would be an advise ticket prepared by Swiss Bank Corporation relating to a transfer made by Wells Fargo Bank Luxembourg, the transfer being made to Schweiz Kreditanstalt. the party whose account was to be credited as typed in, American International Banking Corporation and written over it, American IBC Corporation and the document shows the amount with a value date --

Q Would you give the amount please.

A Francs, 3,309,997.50 for value date 2[illegible] November, and it has the special instructions which were given --

MR. MILLER: I object. It speaks for itself.

THE COURT: I am trying to find out what the document says and there is no objection to letting him read it for me. Go ahead.

A It has a special instruction typed on it which would be the instruction given by the remitter, that is to say, the Wells Fargo Bank N.A. and that special instruction is "Attention Mr. Ribi. Instructions, remit dollar equivalent to Wells Fargo Bank International New York, Attention Mr. William Boland." Those insturctions would be passed on by the Swiss Bank Corporation which was the bank holding the Swiss franc account of Wells Fargo Bank N.A. Those instructions would be passed on to the recipient bank so that the transaction could be properly handled and identified right straight down the street.

THE COURT: Whose document is this?

THE WITNESS: I don't know whose file this came out of but it would be prepared by the bank whose name appears in small print about halfway down the left side of the page, Swiss Bank Corporation. It is a document prepared by them.

THE COURT: Where do you see Swiss Bank Corporation?

THE WITNESS: There are four names printed in kind of small print in four different languages right in here.

THE COURT: I see it now.

THE WITNESS: This is their form which they prepare in connection with remittances they are requested to make by other parties.

THE COURT: And the date of this is November 2nd?

THE WITNESS: Yes, sir. The date of the form is 2-11-72, European style. That would be November 2nd. It also indicates the value date of the payment which is the thing -- you see where it says French francs, it says "val" 2.11, which indicates the value date on which that payment is being made.

THE COURT: November 2nd?

THE WITNESS: Yes.

THE COURT: Let's go down this whole thing so that I get it very clearly. Let's read down from the top. What does that thing say up at the top in handwriting about the "R.H. Bower," have I read that correctly?

THE WITNESS: Sir, I don't know what that is.

THE COURT: Can you make out the handwriting that comes below that?

THE WITNESS: It is in German, sir. I don't understand the German.

THE COURT: All right.

MR. STEWART: These were documents produced --

THE COURT: Please.

The addressee there seems to be Wells Fargo Bank N.A. Luxembourg, is that right?

THE WITNESS: What that says is by order of. That is identifying who initiated this payment of funds.

THE COURT: I see the English there.

Have you any idea as to what is said in the handwriting in the last six or seven lines at the bottom of the page?

THE WITNESS: Sir, I cannot decipher it and it looks like German and I don't understand the German.

THE COURT: All right.

Q Mr. Lilien, what is the English name for Schweiz Kreditanstalt?

A That would be Swiss Credit Bank.

Q I show you Defendant Exhibit AC. Would you describe that document, sir?

THE COURT: Give me the date first.

MR. STEWART: November 1973, Swiss Credit Bank swiss franc account record.

A Well, it seems to me to be simply an extract or statement of account of an account maintained at Swiss Credit Bank by American IBC Corporation with its address on there described as a current account, the account number is identified, the time period covered by the statement is identified as January 1, 1973 -- this would be December 4th, again, the European style of notation, December 4, 1973, and it would indicate that this particular account was maintained in swiss francs and then the various entries to the account are shown by date, by type of transaction and the amounts either debited or credited with the value dates and the balances.

Q Mr. Lilien, I refer you to the date of November 5th.

A This would be the date that shows up as 05/11/73.

Q I ask you what transaction took place on that date?

A This document shows a transaction described as foreign exchange and then it shows in the column which says in our favor, and that I would read as what we would describe as a debit to the account.

Q What was debited?

A 3,308,850 Swiss francs. Then further out on that line there is an identification of the value date, the posting date apparently was November 5th but the value date for the account was November 2, 1973 and then the final line, which is balance, shows 3,265,659.36 with a D after it and apparently that would stand for a debit balance in the account meaning it was an overdraft, the way I read this anyhow.

Let me just see.

Yes, the D should stand for overdraft.

Q I refer you to the date ofDecember 3rd and ask you what transaction appears under that date?

A This item shows up, as far as the posting date is concerned, 03/12/73, identified foreign exchange. Here the figure of 3,309,997.50 in Swiss francs shows in the column in your favor which would be a credit to the account.

The value date of that, even though it was posted on December 3rd, the value date shows as an item for value November 2, 1973 and I guess there must have been more than one item that day because there is no balance after that but there is a balance after the next transaction and it shows the total account being a credit balance on that date.

Q I refer you to November 20th.

A Yes.

Q I ask you to describe the transaction set forth under that date?

A It's entered as of 20/11/73, foreign exchange. It is also a credit. It is for 3,182,557.83. It identifies the value date for that transaction as 20/11/73 which would be the same date as the booking entry, that is to say, November 20th, and it shows a small overdraft in the account of 83,108.53.

THE COURT: Which one of those three transactions is referable to the Wells Fargo loan?

THE WITNESS: Sir, if I could consult that ticket that I was looking at just a moment ago I may be able to match up those figures.

Sir, the figures that match, the ticket we were looking at previously which was generated by the Swiss Bank Corporation reflecting the funds sent to Swiss Credit

Bank, that ticket has matching figures, 3,309,997.50 with value November 2nd and that matches the last item appearing in the column that says "In your favor." So at least by matching up amounts and date these would seem to be identical.

THE COURT: All right.

Which means that American IBC Corporation account was credited for the first time on these transactions on December 3rd, on this transaction?

THE WITNESS: This particular transaction they actually posted the entry to the account on December 3rd although they indicated an earlier value date but they posted the entry on that date of December 3rd.

THE COURT: Can you tell from this account when they sent forward the dollars to the Chase Bank and onward to Wells Fargo?

THE WITNESS: Sir, from this document which only reflects entries to a Swiss bank account there is nothing on this document.

THE COURT: How about the dollar account, Exhibit AE? Can you pick it up from that?

What was the dollars remitted? Was that $1,2042,814.37?

THE WITNESS: Sir, I think the dollar remittance for the November 2nd transaction wasthe one that had 42,000 in it and I think the one for the November 19th transaction was the one that had 46,000 in it.

THE COURT: Where does that show up on the current account? In other words, the dollars never passed through the American IBC account apparently indicative of a direct obligation from the bank to the other bank rather than through the account.

There certainly is no matching dollar figure either in or out of the dollar account with the Swiss Credit Bank.

MR. STEWART: That is right, sir.

THE COURT: I suppose that is consistent with the idea that the Swiss Credit Bank was the only one taking a risk in this transaction and it was taking the risk on the strength of receiving the time deposit Swiss francs.

MR. STEWART: Exactly.

THE COURT: Giving them up and receiving them back against which it made a direct payment to New York through the Chase Bank.

MR. STEWART: Right.

THE COURT: Do you agree with that banking so far as I have indicated it?

THE WITNESS: Sir, trying to put myself in the shoes of the Swiss banker --

THE COURT: Have I reflected correctly the books so far as we have them here?

THE WITNESS: As far as I know, I haven't looked at the other statement but nobody has been able to find this particular amount on there.

THE COURT: I don't find it in or out. It apparently is just a straight obligation assumed by the Swiss Credit Bank which it paid off on by sending its own draft through the Chase Bank to the Wells Fargo.

THE WITNESS: Yes. The Swiss bank's obligation was to deliver dollars to us as instructed and many banks will make those deliveries without even knowing that they have received the incoming money because they trust each other. If they are untrusting they will wait until they are sure they have the incoming money before the outgoing payment.

With the large transactions that take place many banks make the outgoing payment without being concerned that they got the incoming money because more than 99 percent of the cases foreign banking transactions are settled that way.

THE COURT: Does that mean that this transaction was paid for not by American IBC but Swiss Bank Corporation?

In other words, the Swiss bank paid the loan obligation rather than American IBC, isn't that the flow of money? There has been no payment here by American IBC to Wells Fargo at all.

THE WITNESS: The way I would look at it is in terms of a foreign exchange contract that the Swiss bank entered into. They were expecting to receive Swiss francs.

THE COURT: But they didn't pay off American IBC at all. They paid off dollars to the Wells Fargo Bank.

THE WITNESS: That is right.

THE COURT: And Wells Fargo then distributed the money on a bookkeeping basis $42,000 to the customer and $1 million to yourselves?

THE WITNESS: The funds coming into Wells Fargo Bank were identified as coming in from American IBC.

THE COURT: They were identified because you had a transaction which identified it but the pay order of the money was not the bank's customer, it was Swiss Bank Corporation.

THE WITNESS: We got the money from Swiss Bank Corporation.

THE COURT: It wasn't a gift?

THE WITNESS: Not exactly. They didn't give it to us as a gift. Obviously they expected they were going to get the counter-value in Swiss francs from American IBC in fulfillment of the contract.

THE COURT: The only thing American IBC did was to make good on the Swiss franc counter-value but the direct payment of the loan came from the Swiss Bank Corporation, according to these book records.

Go ahead with something.

Q I show you Defendant Exhibit AN and ask you to describe it, please. This may clear up the point your Honor raised.

Would you describe that, please?

A This is a ticket that is received from the clearing house --

THE COURT: Which clearing house?

THE WITNESS: The New York clearing house. It's reflecting payments that are made to us and I am trying to figure out now how this goes. This reflects a payment made to us. The money comes from the Chase Manhattan Bank in New York through a payment system called PEPS which is Paper Exchange Payment System. It means pieces of paper exchange. This is printed up by a computer at the clearing house.

THE COURT: I am familiar with that.

THE WITNESS: It indicated by order of Swiss Credit Bank through Chase Manhattan and for the account of Wells Fargo Bank Luxembourg the money has been paid to Wells Fargo Bank --

THE COURT: That is what I said before. The money was paid to you. It was not paid to your customer at all.

Let's get a xerox of that for everybody.

What happened on the second transaction, do they trace out the money there?

MR. STEWART: I would like to ask the witness about it, your Honor.

THE COURT: Go ahead.

Q I refer you to the date of November 20th on Exhibit AC, Swiss Bank AIBC, Bank Account Record for November 1973.

You have already testified, but would you again show the entry under that date, please?

A Yes. We are referring now to the entry that shows as the entry date 20/11/73. The description is foreign exchange.

This is the date of the bookkeeping entry made by the Swiss Bank, 20/11/73. Foreign Exchange, it shows they are crediting the account of American IBC with the 3,182,557 and they are doing the credit with a value date ofthe 20th of November and leaving the account in a small overdraft.

Q There are two stars next to that figure, are there not?

A There are.

Q Would you look down below and see whether there is another entry reflecting those two stars?

A I see it, you are right, there is. There is an entry and it doesn't have a posting date. It is the last entry. Reversal. There is the same amount reversed which means in our favor, they took the money back out of the account, it doesn't have any value dates and it leaves them with a small credit balance.

THE COURT: That is when they tried to retrieve the money they had sent to New York, they reversed the transaction here in hope they could get their dollars back?

THE WITNESS: I suppose so. We don't know what the date is that that occurred.

THE COURT: Obviously it was after December 3rd.

THE WITNESS: After December 3rd.

Q With respect to Plaintiff's Exhibit 11 dated

May 15, 1973, enclosure No. 4, would you describe the telex in enclosure 4?

A It's a copy of a telex role that must have been on the margin of American IBC and what it is is it's a telex exchange with Mr. Ribi and it is a confirmation or contracting to buy and sell Franch francs.

It's hard to read but it says we confirm having sold to you 3,182,557.92 Swiss francs value November 19, 1973 at the exchange rate of 304 Swiss francs equal $1 U.S. funds.

United California Bank London has been instructed to deliver the above Swiss francs to value November 19th, reference American IBC Company.

Kindly deliver the counter-value in U.S. funds, one, A046,894.85 or $345 to Wells Fargo Bank International Corporation in favor of American IBC Corporation, value November 19, 1973 signed Silverston.

pm

Q With respect to that November 20th entry on Exhibit AC, would that appear to reflect the same Swiss franc amount as set forth in the Telex to Mr. Ribi?

A Yes, it would, except that they are posting it and they are identifying the value date one day later than in fact the contract called for.

THE COURT: Apparently, according to your Exhibit AK, the same thing happened with the United California Bank, the money came from the Swiss Bank Corporation, not to AICB but from the Swiss Bank Corporation through the Chase Bank directly to the Wells Fargo Bank International which got the money and paid itself off.

MR. STEWART: Yes, sir.

THE COURT: Ask the witness about that and see if I have read that correctly.

Q With reference to Exhibit AK, would you describe the transactions set forth in that exhibit?

A There is practically nothing legible on here but, sir, may I simply note that at the top in the lefthand side, it does say "Reference favor American," in this case JBC Corp., New York.

THE COURT: You say it isn't legible.

THE WITNESS: The body isn't but this part up here is. It says "Reference favor." It comes from Chase Manhattan.

THE COURT: This is the one with the $46,000 figure. That is how I identified it. That is coming from the Swiss Bank Corporation through the Chase directly to the Wells Fargo Bank International.

THE WITNESS: Yes, sir. But with a reference in there so we can identify the funds.

THE COURT: That is so you could identify what you were paying yourself off for, isn't that what you're saying to me and that ties in with Exhibit 48, which shows that the account of American IBC was credited and debited -- now the explanation of the bank paying itself off first appears on your ledger sheet. You took the $1,000,000 in the debit and then credited yourself with the 1,042,000 and again did the same thing later. You debited $1,000,000 and took the credit of $1,046,000 and that's how the account winds up with the overage that remains in the American IBC Corporation's ledger account.

MR. STEWART: Your Honor, there is some discussion by Mr. DeJoya in his affidavit with the attached clearing tickets outlining the mechanics of it and that affidavit is in evidence.

THE COURT: The affidavit is in evidence?

MR. STEWART: Yes, sir.

THE COURT: When was it put in evidence?

MR. MILLER: It is part of all the documents, your Honor, on the first day it was offered.

THE COURT: What exhibit number is that?

MR. STEWART: Exhibit 53, your Honor.

THE COURT: I will find it if it's there.

MR. STEWART: I have no further questions.

THE COURT: How have you shown that American IBC ever got its hands on its money so as to turn it over to the bank? I don't see under this line of proof how American IBC, regardless of whether there was a pledge in possession or in custody or whether there was or wasn't an agency, the fact of the matter is the Swiss Bank Corporation paid off the debt and not American IBC in each instance. The money never got into the hands of American IBC.

MR. MILLER: If I accepted your Honor's statement of the facts which I respectfully decline to do --

THE COURT: I am just asking this because I think we are at the point where you have got to establish as one of the elements of your case --

MR. MILLER: I thought we entered into a stipulation of facts so we could limit the issues and I didn't think there was an issue as to whether this was property of American IBC Corporation because it is in the findings of fact.

THE COURT: Which finding of fact relates to this?

MR. MILLER: Number 22, your Honor. On November 2, 1973 Swiss Bank Corp. on behalf of Wells Fargo Luxembourg, forwarded the Swiss francs to Swiss Credit Bank for the account of American IBC with the following instructions:

"Remit dollar equivalent to Wells Fargo Bank International Corp."

Your Honor has been referring to Swiss Bank Corp. Swiss Bank Corp. and Swiss Credit Bank are two different entities.

THE COURT: I mentioned Swiss Credit Bank each time and I correct that if I slipped on that point. It is perfectly clear that what I was talking about is the remittance on the items.

MR. MILLER: I don't dispute that.

THE COURT: I don't see anything in the joint findings of fact that gets into this problem. This problem has just been exposed for the first time.

MR. MILLER: It says for the account of American IBC.

THE COURT: Obviously it is going to be for the account, but the question is whether it is who is paying the thing off. Where is there a finding here that it was agreed to that American IBC paid off its debt or paid anything? The evidence is --

MR. MILLER: Paid its debt to whom?

THE COURT: Paid its debt to Wells Fargo.

MR. MILLER: American IBC paid its debt to Wells Fargo? Is Wells Fargo a creditor of American IBC today, your Honor?

THE COURT: I guess I don't make myself clear. You go ahead and try your case.

MR. STEWART: May I say this, this is the subject of our letter to try to clarify these joint findings.

MR. MILLER: Am I to understand your Honor, in your Honor's view the Swiss Credit BAnk is a creditor instead of Wells Fargo, is that it?

THE COURT: I am not saying who is a creditor. I am saying that the payment you say was made by the bankrupt appears not to have been made by the bankrupt but it was made by a bank. Why the bank paid it and whether somebody owes it the money or whether there is a claim against that bank is of no concern to me.

I am talking about the proof in your case which calls for you to sh[illegible]hat your bankrupt made a payment in four months of bankruptcy. I have yet to have that demonstrated. Under the tickets that are in evidence, unless they are misleading, the money was not paid by the bankrupt at any time.

MR. MILLER: I call your attention to Section 60 which states for the benefit of a creditor or on account of an antecedent debt made or suffered by such debtor. This transfer by Swiss Credit Bank to the account of Wells Fargo or American IBC at Wells Fargo in New York was suffered by the debtor.

THE COURT: I don't know whether it was suffered by the debtor. The question is whether there was an existing obligation from the bank that had been undertaken as part of this locked up transaction to make the payment back there in May.

I think we will leave this for briefing after the trial.

RECROSS EXAMINATION

BY MR. MILLER:

Q Looking at Exhibit AD, which you read, is this a more legible copy, the copy that Mr. Stewart gave me? Can you read the bottom lines on this copy?

A I can read the part in English and I cannot read the part in German.

Q The lower four lines, can you read that?

A I can read three lines in English. But I am not sure of the fourth line. I can read American IBC Corporation, number obscured, Lexington Avenue, New York, New York, U.SA., number obscured, and the bottom line I can't identify as being English and I would guess it is German.

Q Going to the typed portion of the ticket, may I call it a ticket?

A Yes.

Q This, as I understand your testimony, was for a transfer Wells Fargo N.A. through Swiss Bank Corp. to Swiss Credit Bank?

A Yes.

Q What is the significance of the box in the lower righthand corner of the ticket?

A It tells the party at Swiss Credit Bank that it is presumed to have an account at Swiss Credit Bank to whom these funds are being sent or in whose favor they are being sent, in favor of.

Q The funds are being sent from Wells Fargo Luxembourg to Swiss Credit Bank to the account of American IBC Corp., is that correct?

A That is right.

Q Was the second transaction from United California Bank the same as this?

A Well, I don't have the ticket in front of me, I don't know. I would assume so from normal banking practice.

Q As far as you know, it went into the account of

American IBC at Swiss Credit Bank?

A The ticket does not indicate it went into the account.

Q The ticket indicates it was posted.

A It says it was in favor of them.

Q November bank statement, Exhibit 48 --

THE COURT: I don't think very much can be developed from the posting and judging by my own bank statement from my banker I am sometimes appalled at the way the bank clerks post.

MR. MILLER: All I wanted to demonstrate is essentially what the Swiss Credit Bank did in Exhibits AC and AE, debit first and credit is exactly what Wells Fargo Bank International did. Mr. Lilien was talking about overdrafts and it is exactly the same type of procedure. The documents will speak for themselves, your Honor.

Q Mr. Lilien, I show you this document which is not in evidence, dated April 30, 1973 and ask you if you can tell me what that document is?

MR. STEWART: May I see it?

THE COURT: Let the witness speak to it first.

A It says-- I guess it says internal copy. It is a document that is either addressed to American IBC Corporation or refers to a transaction with American IBC Corporation and it says here "As per today's telephone we sold you, please follow the instructions marked with an 'X,' we sold you the amount, $1,042,814.37 to be paid in New York to Wells Fargo Bank. The delivery date of the dollars is November 2, 1973. The exchange rate is 3.1730, and the Swiss Bank franc counter value is three million, three hudred and eight"-- I can't tell whether it is a three or 850. It is not clear.

Then it says "Please sign and return the enclosed confirmation at Schweiz Kreditanstalt."

As I would see it that is a Xerox copy of one of the fanfolds, anyhow, in a confirmation for a forward exchange. It does have a date. The date looks as though it was prepared 4-30-73.

Q April 30th?

A Yes. This would be a copy of one of the items in a fanfold confirming a forward exchange contract made with American IBC Corporation.

THE COURT: Has that been given a number?

MR. MILLER: No, your Honor.

(Plaintiff's Exhibit 56 marked for identification.)

MR. MILLER: If we can take five minutes, your Honor, I have three more that I can have Xeroxed.

THE COURT: All right. Let me see them in the meantime.

You go ahead with your questions and we will send out for Xerox copies later.

Q I show you Exhibit 57 dated May 15, 1973, Mr. Lilien. Can you tell us what that document is?

A This says in the upper lefthand corner, "Confirmation." It is again a document prepared by Swiss Credit Bank. It says of American IBC Corporation. It says "As per today'stelephone and that is dated May 15th,"and it says "We sold" -- it says "You sold to us, you sold to us the amount of" -- "you sold to us the amount of $1,046,894.05 payment in New York, delivery on November 19th, exchange 3.04, equivalent francs 3,182557.92." It says "Please confirm" and that's been signed 23 May 1973, American IBC signed by Sheldon Silverston.

Q I show you Exhibit 58 which is dated May 15, 1973. Can you tell us what that document is?

A I am trying to -- 'Swiss Credit Bank is the originating bank on this document. It refers to a foreign exchange transaction. It says we bought from you the amount of $1,000,000. The value date is May 17, 1973. The exchange date is 3.13 and the equivalent amount sold in this case is entered as Swiss francs, 3,130,000, same value date, May 17, 1973, and it shows a Swiss franc account number.

It says our payment through United California Bank London which tells where they are going to deliver the Swiss francs and it indicates your payment to the Chase Manhattan Bank New York, which is the instruction to American IBC as to where they are to deliver the $1,000,000 .

Q I show you Exhibit 60. That is a Telex from Mr. Silverston on behalf of American IBC to Mr. Boland.

A Yes, this is a Telex from Mr. Silverston to Mr. Boland. Do you want me to read it?

Q No. Did you ever see that before?

A To be very honest, I don't know whether I read it before or not. The facts here are the same as set forth in so many other documents that I wouldn't have to depend on this to get those facts so I don't know if I saw this before or not.

Q I show you Exhibit 38 dated May 15, 1973. Is that a copy of -- well, have you seen that document before?

A I don't know if I have seen this document before but this material has been convered in one of the enclosures to the letters that Mr. Silverston sent to us.

Q That is consistent with the transaction?

A Let me read it again, but I think it is.

Yes, this is consistent with -- I am sure I've seen-

THE COURT: Consistent with what?

THE WITNESS: The same text with the same type face.

THE COURT: Consistent with what?

THE WITNESS: With my understanding of the transaction and things I have read in the file describing the two exchange contracts.

THE COURT: I merely wanted you to finish the sentence so when I read the record I know what you're talking about.

Q This is a Telex or a letter or Telex number to the attention of Mr. Ribi.

A Yes. It seems to come off the machine at the Swiss end.

Q Mr. Ribi is with Swiss Credit Bank?

A Yes.

Q It instructs Mr. Ribi at Swiss Credit Bank that the United California Bank is going to deliver the above sum in Swiss francs to you value November 19th, reference American IBC Corp., is that correct?

A That is what it says.

Q And Swiss Credit is being instructed to deliver the camper value in U.S. funds to Wells Fargo Bank International Corp. in favor of American IBC Corp., is that what it says?

A That is what it says.

Q That is your understanding?

A That is what it says.

Q You don't speak German?

A I don't speak it.

Q Do you know what this document is?

A Somebody's work ticket, I would guess, in a foreign exchange department because I can read kaufen, to buy, and verkaufen, to sell. It looks like a trader's working ticket reflecting buy and sell transactions.

MR. MILLER: I will not offer Exhibit 59 in evidence. It is all in German.

THE COURT: All right.

MR. STEWART: May we see it?

THE COURT: Anything else, Mr. Stewart?

MR. STEWART: No, sir.

THE COURT: You may step down.

(Witness excused.)

MR. STEWART: Mr. Lobonov.

NIKITA LOBONOV, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STEWART:

Q Are you employed by Wells Fargo Bank International?

A Yes, I am.

Q What is your position there?

A I am vice president of the bank.

Q What is your area of responsibility?

A Eastern Europe, Africa and the Middle East.

Q Do you know Mr. Silverston?

A Yes, I do.

Q How long have you known him?

A I have known him since about 1971.

ake

Q I show you Plaintiff Exhibit 25 and ask you whether you wrote that letter?

A Yes, I did.

Q A letter dated November 21, 1973.

A Correct.

Q Would you tell the Court the circumstances leading up to the writing of that letter?

A I wrote it as a result of a meeting with Mr. Silverston.

Q But prior to that time will you explain the circumstances leading up to the writing of that letter to Sunkist?

A Yes. Sunkist had been a prospect for many years of the bank in California. I made a trip to Los Angeles to accompany the officer in charge of soliciting this account and make a call on Sunkist.

During our discussion with Sunkist we realized that the company was trying to sell its products in Eastern Europe but had had difficulties in delayed payments from there.

So they were seeking some mode to insure themselves payment on time and broaden the activities in Eastern Europe.

When I heard this I naturally knew of Silverston's expertise in the field and I suggested the offices whom we were calling on, Mr. Foster, telephone in our presence, make an introduction to Silverston and ask Silverston to help them. This did occur and Silverston wrote a very detailed report to Sunkist indicating in what manner he could help that firm in its desires of trading with Eastern Europe.

Q Do you recall when your visit was, the date of your visit to Sunkist, approximately?

A No. Unfortunately, I see you have my calendar and this might show it.

Q Would this refresh your recollection?

A Yes, it must be during the week of October 29th.

Q 1973?

A Correct.

Q Did you see Mr. Silverston on the 21st or 20th of November?

A Yes.

Q Where did you see him?

A I saw him in the entrance area of our bank at 40 Wall Street.

Q Did you have a conversation with him?

A Yes, I approached Mr. Silverston and asked him how he was doing and why was he not responding to Sunkist.

Mr. Silverston replied that he hadn't had time to reply to Mr. Foster because he had had difficulties in Latin America and that was taking his time. He said something the Lara's might be taking me for about $5 million.

Q Was it this conversation which led you to write this letter to Sunkist?

A Yes.

MR. MILLER: Objection to leading.

Q Prior to that time had you any discussions with Mr. Boland with respect to the position of American IBC?

A No.

Q Prior to November 20th of 1973, did you know that American IBC was insolvent?

A No, if I had known I would have talked to Foster earlier because he was anxious to make a deal.

Q Prior to November 20th did you possess any facts which would lead you to conclude that American IBC might be insolvent?

A None at all.

CROSS EXAMINATION

BY MR. MILLER:

Q Did you have a conversation with Mr. Lilien on the 21st of November? That is concerning Exhibit 25, the letter dated November 21, 1975?

A I could not specifically reply that it was on November 21st or 22nd or 23rd but I did have a conversation with him after I had written the letter.

Q Soon after you wrote the letter?

A Correct.

Q What transpired during that conversation? What did you say to him and what did he say to you?

A Mr. Lilien, as he frequently does, as he did sometimes before, came into the office and said Nick, what is this letter about and I told him that I had learned from Silverston when he came to the bank that he was in difficulty and was anxious to relate to Sunkist some alternative names.

Q You told Mr. Lilien that American IBC Corporation was in difficulty?

A I related to him that Silverston had told me they were in difficulty and this is why I wrote the letter.

Q Financial difficulty?

A Exactly what he told me, that he had had problems with the Laras in South America.

Q Why did you use the word financial difficulty?

A Because $5 million implies a financial difficulty.

Q Did you relate the $5 million figure to Mr. Lilien?

A That I don't recollect whether I told him $5 million or not.

Q You met Mr. Silverston in the reception area you said?

A Yes, I was passing in front of it. I saw him there. Our conversation lasted maybe 50, 70 seconds. We shook hands briefly. I asked him those questions and then I went on whatever business I was on.

Q Did you speak with Mr. Boland?

A No.

Q You knew Mr. Boland was the account officer?

A I did.

Q Do you read the CR-39's?

A I read them, yes.

Q Did you read the CR-39 on American IBC?

A I don't recall doing so.

MR. MILLER: I have no further questions.

THE COURT: Thank you very much, you may step down.

(Witness excused)

VIRGINIA K. VAN DALEY,

called as a witness, being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. STEWART:

Q Where are you employed?

A Wells Fargo Bank International.

Q How long have you worked there?

A Approximately two years, four months.

Q What were your duties in November of 1973?

A November 1973 I was a receptionist for Wells Fargo Bank.

Q Would you tell us your duties as a receptionist please?

A My duties as a receptionist was to answer the telephone for Wells Fargo Bank and also to meet and greet people for the bank itself to, give a good appearance for the company and also to record the people that came into the bank to see any specific VPs or any persons like that.

I wrote their name down in a signature book or record book that I was instructed to use by Mr. Fichou when I first came to the company. I would put the visitor's name and the executive that they would see that day.

Q Were you on duty on November 19th and 20th of

1971?

A Yes, I was.

THE COURT: Can't you stipulate that this lady made some entries there at that time without taking all this time on uncontroversial matter?

MR. STEWART: I would think so.

THE COURT: Show it to him.

MR. MILLER: I have no problem stipulating that Mr. Silverston's name does not appear on November 19th.

MR. STEWART: But it does appear on the 20th to see Mr. Boland.

MR. MILLER: Whatever the book says it says.

THE COURT: Read from the book. There is nothing on November 19th indicating Mr. Silverston's visit to the office and this lady testifies that if it isn't in the book he wasn't there and on November 20th there is something in the book that shows that Mr. Silverston was there and is there a time?

MR. STEWART: No, sir.

THE COURT: That he was there at sometime during the course of the day to see whom?

MR. STEWART: Mr. Boland.

THE COURT: To see Mr. Boland on the 20th.

After you have had an opportunity to see that see if you can stipulate to what I said.

MR. MILLER: I can stipulate, your Honor.

THE COURT: Then cross examine.

CROSS EXAMINATION

BY MR. MILLER:

THE COURT: It has been stipulated that that is the fact.

Q Miss Van Daley, the November 19th is blank so nobody visited the bank on that day.

A That is correct.

Q You record the name of every person who comes into the bank?

A It is my practice to record it, yes.

Q November 20th, that is your handwriting?

A Yes, it is.

Q On November 21st there is nobody, nobody came in?

THE COURT: That means on Monday and Wednesday nobody showed up at the bank, is that right?

THE WITNESS: It occasionally happens like that, yes.

Q And the 23rd of November also?

THE COURT: The 23rd is the day after Thanksgiving.

Q Monday the 26th and Tuesday the 27th of November nobody came to the bank?

A Yes.

Q November 29th, nobody came to the bank?

A Evidentally not.

Q Is that your handwriting on November 28th?

A No, it is not.

Q Were you in the office that week?

A Yes, I was in the office that day. I have people who relieve me for my breaks in the morning and I have people who relieve me for lunchtime and that would be one of the secretaries but at that time it was a particular girl from the LC Department that would relieve me.

Q Did you have any relief on the 19th of November?

A I believe so.

Q And your reliefs, they always write down the name of persons who come in?

A I have instructed them to do so.

Q Do they do it?

A They usually did.

Q Usually?

A Yes.

Q I notice you have business cards clipped to the pages?

A Yes.

Q Whoever it is where I see the name from the business card?

A Yes.

Q Suppose they don't give you a business card?

A I ask them their name and I ask them to spell it.

Q Do you know Mr. Weiner?

A I am not familiar with him. I don't think I have any recollection of meeting him.

Q Did you ever see him in the bank?

A It's possible but I don't remember.

Q Do you remember writing his name down in the book?

A I don't remember, no.

Q If Mr. Weiner came to the bank would you write his name down on the book to see one of the officers?

A Yes, I would.

Q Is that your handwriting on December 3rd?

A Yes, it is.

Q For the week of November 26th, Miss Van Daley until December 3rd you made no entries in this book.

A Yes.

Q Is this your book also, 1974?

A Yes, it is.

Q Were you at the bank on Wednesday, June 12th?

A Yes, I was.

Q Did you see Mr. Weiner at the bank that day?

A I have no recollection whether I did or not.

Q You didn't record anybody being at the bank that day?

A There is nothing written there.

Q Was the entry on November 14, 1974?

A Mr. Ross to see Mr. Ospina.

Q And Mr. Ross is the gentlemen sitting next to Mr. Stewart, is that correct?

A Yes, it is.

Q Do you remember seeing Mr. Weiner on that day?

A No, I don't recall.

Q Do you ever forget to write down the names?

A There would be occasions where if I had three, four, maybe five phone calls coming in simultaneously and I would have somebody coming in to visit the bank it could happen that I would not remember to write the name in because I had five phone calls and I don't think anybody can remember six or seven things at one time.

MR. MILLER: I agree with you.

Q Is there a switchboard by your desk?

A Yes, I have a 757 Console.

Q I am not sure I know what that is. Can you explain it?

A It's a unit that has a trunk and an extension finder to the side. There are nine trunks on the board and there are approximately 100 extensions that I utilize.

Q 100 extensions?

A Yes.

Q And you take all the incoming calls to the bank?

A Yes.

Q Does that keep you busy?

A Yes, it does.

MR. MILLER: I have no further questions.

REDIRECT EXAMINATION

BY MR. STEWART:

Q When do you customarily take your breaks?

A I usually take my breaks at the point in the time at '73 from between 10:00 o'clock to 10:30.

Q In the morning?

A Yes.

Q How about lunch?

A Lunch at that time I took I believe, if I am correct, it was 1:00 o'clock -- possibly 12:00, I am not sure exactly. I don't remember now when I took it in '73.

Q When are you taking it now?

A 1:00 o'clock.

MR. STEWART: Thank you.

RECROSS EXAMINATION

BY MR. MILLER:

Q If Mr. Silverston was in the bank on the 19th between 10:00 and 10:30 you would have known about it, you would have been on your break?

A That is right.

MR. MILLER: Thank you.

THE COURT: You may step down.

(Witness excused)

MR. STEWART: Mr. Vanveerson, please.

ROBERT R. VAN VEERSSEN,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STEWART:

Q Are you employed at Wells Fargo Bank International?

A Yes, sir.

Q How long have you been employed there?

A Approximately three years.

Q What is your position there?

A I am a vice-president in charge of the Latin American relationships.

Q Did you meet with Mr. Silverston on November 20th of 1973?

A Yes, sir.

Q Can you state how you recall the date?

A Because I took Mr. Silverston out to lunch. I have an expense voucher and I recollected the date by looking up our files for expense vouchers and remembered them, that the date was November 20, 1973.

Q I show you Plaintiff's Exhibit No. 35 for the month of November 1973 and ask you whether that is the voucher you are referring to in your testimony?

A Yes,that is right.

Q What were the circumstances of your meeting with Mr. Silverston on that date?

A On that same date I met Mr. Silverston for the first time. He was introduced to me by Mr. Boland who asked me to take him out to lunch and discuss a proposal that Mr. Silverston had for a financing in the Dominican Republic which falls in my geographical area of responsibility and would I go down and have lunch with him and discuss the matter.

Q What was the nature of the discussion that you had with Mr. Silverston at lunch?

A The transaction he outlined to me was the following:

There was to be a sale of motor vehicles from Yugoslavia to the Dominican Republic and these motor vehicles were designed for policemen in the Dominican Republic for their private use.

He was the man who brought the two parties together, the motor vehicle producer and the users of the motor vehicle and for that he explained he would get a commission.

And would we, Wells Fargo Bank International, be interested in financing this because this was not going to be obviously a cash sale because Dominican policemen could not afford to pay cash for a fairly expensive motor vehicle but this would need financing over a certain period of time which now escapes me.

I don't know exactly how long it was. I believe it was somewhere in the neighborhood of from four to five years.

I explained to Mr. Silverston that obviously a promissory note of five years from diverse Dominican policemen would not be a very good deal for us. He understood that and said no.

In this case the police force as such under the Ministry of Justice of the Dominican Republic would be willing to co-sign or guarantee these individual notes of policemen.

I then told Mr. Silverston that I didn't even feel that that was satisfactory to me because I certainly wouldlike to have an overall guarantee from the Central Bank of the Dominican Republic or if that could not be obtained, sometimes it cannot for different constitutional reasons, at least a guarantee of the Ministry of Finance.

He said that he thought that also could be arranged and the final conclusion was that I said "Obviously, Mr. Silverston, for an amount like that which was I think near $2 million I do not have the authority to commit to you. I will have to discuss this within the bank and obtain the necessary approvals. I will let you know hopefully in a couple of days what the bank's decision is."

After this I cannot quite recall whether it was the next day or the day after--

Q Before you go to the next day, did Mr. Silverston tell you at lunch that American IBC was insolvent?

A No, not at all.

Q Did you know that American IBC was insolvent on November 20th?

A I had no knowledge of that at all.

Q Did you have any reason to believe that American IBC might be insolvent on November 20th?

A No, sir, I did not.

Q I didn't mean to interrupt you.

Would you go on and explain what you did next as far as Mr. Silverston was concerned?

A The next day or the day after or perhaps two days after, I don't know quite sure any more, I met with Mr. Lilien to outline -- he was the executive vice-president -- the transaction and after having thought about it I decided to propose to Mr. Lilien that we would not engage in this transaction with American IBC because -- my reasoning for this was this, I thought that this would be a one-deal transaction for us whereby we got paper, even if it was guaranteed by the Central Bank of the Ministry of Finance, it would not give the bank the advantage it would have if we had a direct relationship with the

Dominican Republic Central Bank or the Ministry of Finance.

The objective of commercial banks is to try to develop longer, lasting relationships and not specifically one-shot deals which even might be attractive for rate reasons but then the relationship would, so to speak, die off on the vine.

I proposed to Mr. Lilien, I said, "Mr. Lilien, I don't think we should do it. The bank has now enough capabilities itself to develop relationships with the Dominican Republic Central Bank or the Ministry of Finance.

And that was the reason I decided -- it was my opinion that we should not do the transaction.

Mr. Lilien then concurred with me and said, "I think you are absolutely right" and I cannot quite recall -- then I called Mr. Sheldon Silverston on the phone, but I told him on the phone we had decided not to do the transaction for these reasons.

Q Did you explain those reasons to him directly?

A Yes.

Q Did yourrejection of the transaction have anything to do with the financial condition of American IBC?

A No, not at all.

CROSS EXAMINATION

BY MR. MILLER:

Q Do you know Mr. Lobanov?

A Yes.

Q Is your office close to Mr. Lobanov?

A Fairly close, yes.

Q You took Mr. Silverston to lunch on November 20th?

A Yes.

Q Where did you meet him?

A I met him at Mr. Boland's office. Mr. Boland said to me to come in a moment, I have Mr. Silverston here, you take him out to lunch. He wants to discuss a transaction for the Dominican Republic.

Q Were you in Mr. Boland's office for any period of time?

A No. I said, "I have to go back quickly, I have to make a telephone call."

I remember very well because I was under pressure to finish a transaction and I said I will be back in five minutes, which I was, and I took Mr. Silverston to the Bankers Club.

Q Was anyone else present there?

A No, sir.

Q How long was that luncheon?

A I don't recall but it must have been fairly short because that day I was under enormous pressure and with a lot of work to do and I certainly would not have gone out to lunch but grabbed a sandwhich inside the bank if Mr. Boland had not asked me to take Mr. Sheldon Silverston out to lunch.

Q The transaction that you discussed at that lunch, did that involve an extension of credit to American IBC Corporation?

A No, we would discount notes and our final obligator would be either the Ministry of Finance or the Central Bank or something.

Q In effect Mr. Silverston was trying to earn a commission of some type.

A That is what I think he tried to do, yes.

Q When you got back to the bank did you go in to tell Mr. Boland what happened?

A No. I did not tell Mr. Boland at that time because I had so much work to do I ran off to my office and tried to clean my desk.

Q The discussion you had with Mr. Silverston had nothing to do with the credit of American IBC Corporation, did it?

A No. It would not have had anything to do with the credit of American IBC, no.

Q That was never a subject of conversation?

A No.

Q Are you on the circulation list?

A Yes, I am.

Q I show you November 25, 1973, Exhibit 25.

Did you ever see a copy of that letter?

A I have seen a copy of this letter but I am not quite -- I cannot remember at what time that might have been, sir.

Q Was it in 1973?

A Possibly, yes. You know, I was also traveling at certain times and when you are out of the bank then you are the last one who sees it although you might be Number One on the list.

So I have seen it, yes. I have seen this letter but at what time I cannot absolutely recall, sir.

Q What did you do? Did you read that letter when you saw it?

A Yes.

Q What did you do after that?

A I asked Mr. Lobanov and he gave me -- he stated to me the reason for him writing this letter was because he had met Mr. Sheldon Silverston somewhere in the bank and asked him why he did not respond to Sunkist and that Mr. Silverston had told him that he had troubles in Colombia. That was all about it.

I was not interested further because American IBC was not my client.

Q You weren't interested in American IBC?

A No.

Q If you got a CR-39 in American IBC you are not interested?

A I know then American IBC is a client of the bank so in a general sense I try to keep up even in other geographical areas who are the clients of the bank as a whole.

Q In 1973, Mr. Van Veerssen, South America was your territory?

A Yes, sir.

Q Did Mr. Boland discuss with you at any time the problems American IBC was having in Colombia?

A Not at all.

Q Was Banco de la Republica in Colombia one of your contacts?

A No, not mine of our parent bank in Wells Fargo, San Francisco.

Q You said you were very busy when you got back after lunch on the 20th.

A Yes.

Q Did you speak to Mr. Boland again on the 21st?

A I might have, yes.

Q Do you recall?

A No, I am not sure that on that date I spoke to him but I have somewhere in the course of that week I said -- after the decision had been made, after I talked with Mr. Lilien I told Mr. Boland that I had proposed to Mr. Lilien and he had agreed that we would not do the transaction.

Q Do you remember when you spoke with Mr. Lilien, the date?

A No. It must have been after -- obviously after the 20th but whether it was the 23rd or 22nd I really don't recall.

Q Do you remember whether it was before Thanksgiving or after Thanksgiving?

A I am not sure, sir. I could not answer you.

Q Was the bank closed the Friday after Thanksgiving?

A No. I worked after Thanksgiving.

Q Did you speak to Mr. Lilien on that Friday?

MR. STEWART: I object to that. He already said he can't recall.

MR. MILLER: I withdraw the question.

Q Did you prepare an outline of the transaction?

A No.

Q Did you make any notes on the transaction?

A No.

Q Any notes on the lunch?

A Well --

Q Other than the expense voucher?

A No.

MR. MILLER: No further questions.

THE COURT: Thank you very much, you may step down.

(Witness excused)

THE COURT: Anything else?

MR. STEWART: No, sir.

THE COURT: Defendant rests?

MR. STEWART: Yes, sir.

THE COURT: Rebuttal?

MR. MILLER: Unless Mr. Stewart would stipulate I would put Mr. Weiner.

THE COURT: What dates?

MR. MILLER: June 12, 1974 and November 14th.

THE COURT: How did he introduce himself there? To see whom?

MR. WEINER: I asked to see Mr. Stewart the first time. I was accompanied by another associate from Weil, Gotshal & Manges.

THE COURT: Did you ask for an officer of the bank?

MR. WEINER: No.

THE COURT: And November 14th?

MR STEWART: He was with Mr. Ross.

THE COURT: Did you ask for an officer?

MR. WEINER: I asked for Mr. Ross.

THE COURT: Who is Ross?

MR. STEWART: My associate.

MR. WEINER: I met Mr. Stewart with Mr. Lilien at the bank that day.

THE COURT: Do you stipulate to those meetings?

MR. STEWART: Yes, sir.

THE COURT: Anything else by way of rebuttal?

MR. MILLER: I would ask if Mr. Stewart would stipulate that he was in the bank on Wednesday, June 12th and his name does not appear in the diary.

MR. STEWART: If you will also stipulate that I was in and out of there all the time.

THE COURT: I don't see how this affects the two $1 million transactions.

MR. MILLER: I will stipulate he was in and out, your Honor.

THE COURT: I will stipulate they didn't go to see an officer of the bank in view of the evidence.

MR. MILLER: I don't know who Mr. Stewart went to see, your Honor.

THE COURT: Anything else by way of rebuttal?

MR. MILLER: No, your Honor.

THE COURT: Both sides rest?

MR. MILLER: Yes.

MR. STEWART: Yes, your Honor.

THE COURT: Before I declare everybody rested Defendant Exhibit AN which was offered in evidence, the deposition of Mr. Jardin is offered as a deposition pursuant to Rule 26-D that was taken by the plaintiff who was present at the deposition and represented at the taking of the deposition and was obviously due notice thereof but by reason of taking it, and it has been testified and not controverted that Mr. Jardin is of a greater distance than 100 miles from the place of the trial and is out of the United States and specifically is in Teheran, Iran.

Mr. Miller has graciously said that he does not contend that Mr. Jardin's absence was procured by the defendant offering the deposition.

Under those circumstances the deposition is received in evidence.

I take it there are no specific matters that are objected to and the objection went to the question as to the availability or unavailability of the witness and the Court has found the requisite facts under Rule 26-D, Subdivision 3 which permits the receipt of the deposition in evidence. It may be marked.

(Defendant Exhibit AM received in evidence)

THE COURT: The clerk tells me, Mr. Miller, that you marked Exhibits 55 to 60 but his record does not show that they have been offered in evidence.

Do you intend them to be in evidence or not?

MR. MILLER: Yes, your Honor. With the exception of the one that is in German.

THE COURT: Exhibits 55 through 60 excluding Exhibit 59 are received under the same understanding that the materiality and relevancy thereof is reserved for ruling at the conclusion of the case.

All right, gentlemen, I think that concludes the taking of the evidence.

There are a couple of things I want to discuss with you for post-trial briefing.

There is no question in my mind that the facts conclusively show that there was an intention on the part of the lender and the borrower to make a secured riskless transaction both for the bank and for the borrower.

The questions that I think counsel should address themselves to are the following:

One, did American IBC make payment of $2,088,000 in round numbers to Wells Fargo Bank within four months of the bankruptcy?

Two, did Wells Fargo directly or through an agency maintain a security interest in the time deposits, A, by the writings that passed among the participants through pledge agreements, through assigments for the benefit of third party beneficiaries or otherwise or, B, by parol.

And in that latter connection please address yourselves to the question whether a time deposit obligation may validly be pledged by a parol understanding and parol agency as collateral security for a loan indebtedness.

Three, does the applicable rule of bankruptcy, Section 60, look to state law for the interpretation of when there is a pledge, collateral or an assignment.

Four, is it of any significance other than to evaluate the existence or non-existence of a pledge agreement or understanding that a judgment creditor could have levied on the time deposit to the exclusion of the lender or does the trustee in bankruptcy stand in the shoes of American IBC or in the shoes of a judgment creditor in the circumstances of this kind of a case.

I am under the impression that under the Uniform Commercial Code no writing is required in connection with a pledge, that a security interest is enforceable against the debtor if the collateral is in the position of the secured party or its designated agent or the debtor has signed a security agreement containing certain prescribed matters which seem to be covered by the pledge agreement and the advance account agreement forms in this case.

I am further of the impression that filing and recordings are not necessary under the Uniform Commercial Code to perfect a security interest in the collateral as to which a pledge can be spelled out.

Without intending in any way to indicate that I have arrived at any conclusions the foregoing are indicative of the questions that I am currently considering in the light of the evidence.

The question of whether the bank knew or had reasonable basis to believe that there was an insolvency stand on a different foot and that will have to be determined on the basis of the record and the Court's evaluation of the demeanor evidence and the issue of credibility.

I believe that that indicates the matters that I would like to have counsel advert to specifically without necessarily repeating anything that has already been carefully briefed in the briefs that have heretofore been submitted.

If there is any particular question that counsel have in mind to probe what I may have in mind or don't have in mind, I will be glad to hear about it.

How much time does counsel believe is necessary to have before final submission of this matter? I am not asking that question in order to create any time pressures. I am inquiring so as to be able to deal with the matter promptly upon submission.

MR. MILLER: If your Honor please, I have been on trial for a number of days right in a row.

THE COURT: Just the amount of time .

MR. MILLER: I would need at least four weeks.

THE COURT: Mr. Stewart?

MR. STEWART: Four weeks is fine with me, your Honor.

THE COURT: In other words, you would exchange your briefs four weeks hence and then reply to each other thereafter, is that what you want to do?

MR. STEWART: I would hope we would be able to say everything the first time.

THE COURT: It's all right with me. I hope you don't find yourself in a position of two trains operating on opposite ends in the darkness and passing each other silently without ever meeting.

MR. STEWART: It might be preferable if we had a period to exchange briefs and have a week to reply. I would be prepared to exchange briefs in three weeks.

THE COURT: Suppose you take the four weeks to exchange briefs which will bring you to the 19th of June and bring on the 26th of June?

MR. STEWART: That is fine, your Honor.

THE COURT: Make your briefs brief and your replys pertinent to the situation.

In connection with the request to see the original books to be sure that I have a clear understanding of what American ~~IBC books~~ look like --

MR. MILLER: They are here, your Honor.

THE COURT: I merely wanted to check out the cross references that appear on the journal entries to the kind of pages and entries to which they refer so that I am not left in the posture of not understanding those entries.

For example, if you look at Exhibit B there are references there to other records, such as page A-30 and L-2 and E-4.

I think it would be well to be sure that we have the composite records.

MR. MILLER: I have no objection to leaving these two books with the Court.

THE COURT: I would rather have you take them back with you and look at them right now.

(Trial concluded)

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Due and timely service of ONE copies
of the within APPENDIX is hereby
admitted this 12TH day of APRIL 1976
Weil, Gotshal & Manges - 10 30 AM
Attorneys for APPELLEE